without first reviewing the pre-sentence report. Guidry's lawyers asked for the "court [to] allow the lawyers to have a conference in chambers with Your Honor." (R010322;R010381/Exh.3/pp.6-17)

Judge Parker held an unrecorded conference in chambers with Guidry, his lawyers and the prosecutors. To this day, the government has not disclosed what took place in that conference. After returning to the courtroom, Judge Parker announced that "**our little conference in chambers has resolved a matter.**" Judge Parker then indicated that he would accept the plea agreement, and was "bound to a specific fine and the other provisions relative to monetary matters that are included in the plea agreement, but that the sentencing guidelines would apply to any term of incarceration." (R010322;R01038/Exh.3/p.17) With that assurance, Guidry agreed to go forward with his plea.[1]

Three weeks later, Petitioners were indicted. Nearly a year later, before the Petitioners went to trial on the criminal case, the State of Louisiana commenced a civil action against Guidry in State court seeking millions of dollars in damages stemming from Guidry's conduct in connection with the Treasure Chest Casino – the same conduct that was at issue in Petitioners' criminal case. (R010322;R010381/Exh.7) The government obtained an order staying the State action pending the Edwards' criminal trial. (R010025) That stay remained in effect until after the direct appeals were exhausted.

In early January, 2000, at the beginning of Petitioners' trial, the government produced the Guidry plea agreement, the Moreau letter, and the transcript of Guidry's plea allocution. The

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[1] Before defendants had obtained a transcript of Guidry's plea proceedings, the government flatly denied that Judge Parker had "participated in the Guidry plea negotiations." (R010322;R010381/Exh.4/p.37; Exh.5/p.13)

government did not produce any record of what had taken place in Judge Parker's chambers or otherwise advise the defense that, though the written documents did not spell it out, the federal prosecutors had promised Guidry that he would not owe any money to the State of Louisiana. Thus, when the trial began, the defendants believed that any promises made to Guidry to secure his cooperation were fully set forth in the written record, and included only: (1) a limit on the maximum jail sentence; (2) the $3.5 million cap on payments to the federal government; and (3) the District Attorney's agreement to grant Guidry criminal immunity.

During Guidry's cross-examination, defense counsel sought to explore the details of Guidry's plea agreement. Guidry acknowledged that his financial exposure could have reached over $300 million, but he adamantly denied that his liability was capped at $3.5 million by virtue of his plea agreement. When asked whether he got to "keep" over $100 million in profits from the Treasure Chest casino, he testified:

> **You got to remember, I've got two or three lawsuits that's pending against all this money.**

(R010322;R010381/Exh.8/pp.191-93, 209-14)

Since the most significant of those "pending" lawsuits was the multi-million dollar civil action filed by the State of Louisiana, Guidry left the defense and the jury with the clear impression that nothing in his plea agreement or in his arrangements with the federal prosecutors limited his potential liability to the State.

Guidry's mention of the "pending" lawsuits triggered an immediate reaction from the government. The government interrupted the testimony with spurious objections, and the Court ruled that any questions relating to the forfeiture had to be connected "to the plea agreement." When counsel returned to

the State's civil lawsuit, the government again interrupted, objecting that Guidry had not "waived any attorney/client privileges," and that those lawsuits had been stayed. The Court ruled that defense counsel could not ask about the State lawsuit. (R010322;R010381/Exh.8/pp.215-16, 224-29)

The Doug Moreau letter also came up, and again the federal prosecutors deftly avoided any inquiry that risked revealing their promise to Guidry to limit his exposure to the State. Guidry was asked whether he was granted immunity by the State. He fudged, and the prosecutor again intervened, pronouncing that the agreement was not with the State, but **only** with the local District Attorney. (T2/4/00 at 214-17)

After petitioners's appeals were exhausted, the stay of the State civil action, which had remained in effect throughout the appellate process, was lifted. Guidry promptly moved in the State court for a preliminary injunction, claiming that his agreement with the federal government barred the State lawsuit.

Guidry's attorneys submitted affidavits, testifying that "their client's chief concern in reaching a plea agreement with the federal prosecutors was to place a limit on the financial consequences to any guilty plea;" that even after reaching an agreement limiting the financial exposure to $3.5 million in fines, restitution and forfeiture, Guidry would not proceed unless the State "would agree to limit its financial recovery to the amount specified in the federal proceeding;" and that "**everyone involved in these negotiations had the clear understanding that the outside limit to the financial consequence to Mr. Guidry from the state and federal governments would be no more than $3.5 million.**" (R010322;R010381/Exh.11; Exh. 12)

That was the first time that the defense had any hint that the federal agreement with Guidry included a promise, or at least, a "clear understanding," that Guidry's financial liability to the State of Louisiana was limited by the $3.5 million federal

forfeiture.

A hearing was held in State court on June 26, 2003. Guidry testified that the amount of money he would be required to forfeit was the "major part" in his plea discussions:

> A. Well, there was three things that come to mind. One thing was to see how long I was going to be, how much time I could get, and, number two, what was the maximum amount of time I could get; and secondly was what kind of charges I'd be charged with; **and last, but not least, what's the most amount of money I'd have to pay.**
>
> Q. ... Was the amount of money a significant point in your mind in those negotiations?
>
> A. Absolutely. . .
>
> Q. Did there come a time at the point when you were in court entering your guilty plea, which they call a rearraignment in federal court, did there come a time that an issue came where you stopped because of the monetary issue involved here?
>
> A. That's correct. What I made – when I made – ... **I can remember that one of my bigger concerns was that I didn't want to get double-dipped, I guess you could call it. I wanted to make sure that I settled everything, that I settled everybody that was involved when it came to the State and the federal government.** I wanted to know how I

> could do that, and that's when they told me it would take the D.A. of where all this happened to agree to – to allowing and giving me immunity. And that's what I understood had happened, that **Mr. Letten went up there and he got the letter that was needed from Mr. Moreau to guarantee me that there would be no more than the amount that I had agreed upon, and I wasn't going to make no deal until then.**

(R010322;R010381/Exh.15/pp.87-89)

When questioned by the State's counsel, Guidry went even further:

> The three and a half million dollars was exactly the maximum amount that I was – in my mind, that I was supposed to pay. **In my – I had a guarantee from the government**, I had a guarantee from my lawyers as far as I'm concerned, that by having his letter and me telling the truth, that Doug Moreau was never going to come after me and that all – **for nothing and not for a nickel more, no one, nothing federal or nothing involving the state, no agencies in the federal government or the State.**

Guidry further testified that the federal prosecutors told him that "with the letter [he] did not have to worry about no government entity coming after him." (R010322;R010381/Exh.15/p.93-95)

A former Assistant United States Attorney, who represented Guidry in his negotiations in connection with his plea agreement, confirmed that the financial implications of the plea threatened to derail the plea, but agreement was reached

when the State became "locked" into the financial amounts set forth in the federal plea agreement. He personally represented to Guidry that there would be no further civil liability to the State based on the plea agreement, the DA's letter, and the "surrounding circumstances," including "**the fact that the feds agreed to [it]**." (R010322;R010381/Exh.15/pp.77-84)

Two federal prosecutors testified at the hearing, Jim Letten, United States Attorney for the Eastern District of Louisiana, and Fred Harper, an Assistant United States Attorney. Letten testified that "limiting the financial consequences" to Guidry "**became the only sticking point that held us up for a long time** before we actually came to an agreement, a meeting of the mind. (R010322;R010381/Exh.15/pp.5-6)

AUSA Harper agreed that the monetary penalty was a "major issue" with Guidry. Harper testified that "there was a discussion with Judge Parker in his chambers regarding whether or not Judge Parker was going – was willing to accept the terms and the conditions outlined in the plea agreement, and Judge Parker decided that he would accept them after hearing from the government and from defense counsel." Securing this approval was critical to the government because Guidry was "absolutely" an "essential or key witness to the ultimate result of [the Edwards] trial." (R010322;R010381/Exh.15/p.54-57)

Harper, though conceding that the understanding was that Guidry's total financial liability was capped at $3.5 million, denied there was a "side agreement." His position, later reiterated by the government in its Brief to the Fifth Circuit, was that this "understanding" was reflected in the Moreau letter regarding criminal immunity. Harper then explained the government's failure to disclose to the defense that it had an "understanding" that Guidry would not be liable to the State of Louisiana in damages by stating that he never contemplated that the State of Louisiana would sue a federal cooperating witness. (R010322;R010381/Exh.15/pp.66-68)

But the State did sue. It commenced its action against Guidry **before** the Petitioners' trial. Yet even then the government did not disclose the promise it had made to Guidry, or tell the defense that Guidry and the prosecutors had a "clear understanding" that any State lawsuit would be barred by the plea agreement.

On July 28, 2003, the State court ruled that, as a matter of law, the granting of immunity by District Attorney Moreau applied to criminal culpability only, and that the federal government and district attorney could not legally bind the State of Louisiana. (R010322;R010381/Exh.16) The court did not address Guidry's understanding of the agreement or whether the federal prosecutors had promised Guidry that his financial exposure to the State was limited by the plea agreement.

In October, 2004, Guidry filed a Third Party Petition in the State action claiming that he had an enforceable agreement with the federal government precluding any civil liability to the State. Guidry alleged that, in light of that agreement, the federal government is liable to him in indemnification for any damages recovered by the State. The federal government removed the action to the Middle District of Louisiana, where it is now pending. (R011574/Exh.3)

All of this evidence, and more, was before both the District Court and the Fifth Circuit. Petitioners argued that their due process rights had been violated by the failure to disclose the full extent of the agreement with Guidry and by the prosecutor's allowing Guidry to misrepresent to the jury that his millions in profits from the casino were not secure because of the pending lawsuits. At a minimum, Petitioners argued, they were entitled to an evidentiary hearing.

In its Brief to the Fifth Circuit, the government did not dispute that Guidry had a legitimate expectation that his liability

to the State was limited, but rather argued that it was the Moreau letter that had extended civil immunity, and that, because the Moreau letter was disclosed, the government had complied with its constitutional obligations. (Government's Brief at 19-21) This argument never made legal or practical sense. Under the Louisiana State Constitution, a District Attorney, a member of the Judicial Branch, cannot bind the Attorney General, a member of the Executive Branch. La. Const., Art. 4, Sec. 8. Presumably, the federal prosecutors, members of the Louisiana bar, were aware of this bedrock principle of State constitutional law. Thus, it seems unlikely that the prosecutors truly believed that the Moreau letter was the vehicle by which civil immunity was extended. In any event, the Moreau letter on its face, mentions only criminal immunity, and is from the District Attorney and not the Attorney General. Thus, the defense could not be charged with "construing" it to include a guarantee that Guidry would be protected from a State of Louisiana civil lawsuit.

The Fifth Circuit, denying Petitioners a hearing on their well-documented claim, held that any suggestion of an undisclosed oral promise to Guidry that he would not be liable to the State of Louisiana was "improbable" and "speculative" because it was unsupported by, among other things, Guidry's plea agreement and the Moreau immunity letter. (App. 15-19) Yet, without any effort to reconcile the two statements, the Fifth Circuit also concluded that the parties believed that the Moreau letter "should be construed under Louisiana law to include immunity from a state civil suit." (App. 16)

Since Guidry and his lawyers testified, unequivocally, that the federal prosecutors had "guaranteed" Guidry that he would not owe any money to the State, and since Guidry plainly believed that his millions were protected by the assurances he had received from the federal prosecutors, the only conceivable meaning of the Fifth Circuit opinion is that, because there was no writing specifically setting forth this guarantee, the guarantee was too "speculative" to require disclosure. In other words, by

not reducing the "promise," or "guarantee," or "clear understanding" to a writing that would ensure enforceability, the government could successfully avoid disclosing it to the defense.

It is this rule, which threatens to dilute the due process protections afforded by Brady v. Maryland, 373 U.S. 83 (1963), and Giglio v. United States, 405 U.S. 150 (1972) (and their progeny) that prompts this request for this Court's intervention.

REASONS FOR GRANTING THE WRIT

I. CERTIORARI SHOULD BE GRANTED TO RESOLVE A CONFLICT OVER WHAT INDUCEMENTS TO A COOPERATING WITNESS MUST BE DISCLOSED AND TO DECIDE WHETHER THE GOVERNMENT MUST DISCLOSE ANY REPRESENTATION MADE TO A COOPERATING WITNESS THAT IS INTENDED TO SECURE THE WITNESS'S COOPERATION AND IS RELIED ON BY THE WITNESS, EVEN IF THE REPRESENTATION IS NOT IN WRITING AND IS NOT STRICTLY ENFORCEABLE

A defendant is deprived of his constitutional right to due process when the prosecutor withholds exculpatory evidence, "where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Brady v. State of Maryland, 373 U.S. 83, 87 (1963). It is now a bedrock principle of constitutional law that Brady applies to impeachment evidence and that promises of leniency, or other "inducements" that would be relevant to the jury's evaluation of the witness's credibility, must be disclosed. Giglio v. United States, 405 U.S. 150 (1972). See also Banks v. Dretke, 540 U.S. 668 (2004); Kyles v. Whitley, 514 U.S. 419 (1995); United States v. Bagley, 473 U.S. 667 (1985); Napue v. Illinois, 360 U.S. 264, 269 (1959).

Though the law seems clear, the courts have been unable to agree on how to treat unwritten statements made by prosecutors in an effort to induce a witness to cooperate. Assurances provided to a witness, whether or not reduced to writing, provide a powerful incentive for a witness to fabricate. See, e.g., Hoffa v. United States, 385 U.S. 293, 311 (1966). Unfortunately, as this case starkly illustrates, many courts are willing to tolerate the suppression of "soft words of hope"[2] – implicit understandings that convey to the witness a promise that he is to receive a benefit but that are not framed as express, enforceable contracts. A court that views the constitutional issue through the lens of contract law may conclude that a representation made to a witness that does not rise to the level of a contractually enforceable obligation need not be disclosed.[3] Yet, as in this case, the unrecorded guarantee, the vague assurance of special treatment, is often the key to convincing the witness to testify. The inquiry should be, but often is not, whether the witness believed he had a deal with the prosecution and whether that belief had the potential to influence his testimony.

This case, therefore, raises an issue of exceptional importance that has never been directly addressed by this Court: for the purposes of Brady/Giglio disclosure, what constitutes an "inducement" to a cooperating witness? Put another way, must the prosecution disclose benefits that are implied, or alluded to, or understood, and that the witness subjectively believes will

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[2] Zuern v. Tate, 101 F.Supp.2d 948, 971 (S. D. Ohio 2000), rev'd in part on other grounds, 336 F.3d 478 (6th Cir. 2003), cert. denied, 540 U.S. 1198 (2004).

[3] In this case, during oral argument, one Justice of the Fifth Circuit made just this point, noting (presumably ironically), that an "oral promise" from the prosecutor is "not worth the paper it is written on."

inure to his benefit if he cooperates, even if they are not concretely stated and may not be enforceable?

The case law is in disarray. See generally R. Michael Cassidy, "Soft Words of Hope:" Giglio, Accomplice Witnesses, and the Problem of Implied Inducements, 98 N.W. U. L Rev. 1129 (Spring 2004) (citing the conflict in the case law); Note, Rational Expectations Of Leniency: Implicit Plea Agreements And The Prosecutor's Role As Minister Of Justice, 51 Duke L.J. 1333 (Feb. 2002) (same).

Some courts, like the Fifth Circuit here, have found no constitutional violation when the prosecutor has failed to disclose oral statements, understandings or other "soft words" of encouragement. See, e.g., Tarver v. Hopper, 169 F.3d 710, 715 (11th Cir. 1999) (no violation where prosecution told witness that if he cooperated it would be taken into consideration because it did not "ripen into a sufficiently definite agreement"); Alderman v. Zant, 22 F.3d 1541 (11th Cir.), cert. denied, 513 U.S. 1061 (1994) (defense lawyer's implicit understanding does not create obligation of disclosure); McCleskey v. Kemp, 753 F.2d 877, 884 (11th Cir. 1985), aff'd on other grounds, 481 U.S. 279 (1987) (no Giglio violation where detective promised witness he would "put in a good word for him").

Still other courts have concluded that any representation, no matter how informal or imperfect, is subject to disclosure. See, e.g., Commonwealth v. Hill, 432 Mass. 704, 739 N.E.2d 670 (2000) (due process violated when prosecution failed to disclose it had told witness it would take cooperation into consideration);[4] People v. Diaz, 297 Ill.App.3d 362, 696 N.E.2d

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[4] The Supreme Judicial Court of Massachusetts has been particularly forceful:

819 (1st Dist. 1998) (constitutional impropriety where prosecutor did not disclose informal "OK" of witness's illegal sentence because "an agreement between the State and its witness does not have to be so specific that it satisfies the traditional requirements for an enforceable contract"); Burkhalter v. State, 493 S.W.2d 214 (Tex. Crim. App.), cert. denied, 414 U.S. 1000 (1973) (obligation to disclose where no direct promise of immunity but defendant was told his testimony would help his case).

Cooperation deals provide a breeding ground for abuse. A cooperating witness has a powerful motive to fabricate to secure the best deal possible from the prosecution. See generally Stephen S. Trott, Words of Warning For Prosecutors Using Criminals as Witnesses, 47 Hastings L.J. 1381, 1382 (1996); Ellen Yaroshefsky, Cooperating With Federal Prosecutors:

> We take this occasion to emphasize that any communication that suggests preferential treatment to a key government witness in return for that witness's testimony is a matter that must be disclosed by the Commonwealth . . . The fact that the terms of the agreement are not clearly delineated does not insulate the arrangement from disclosure. Indeed, the very nature of the situation may well require that its terms be vague as the consideration given may be dependent on a degree of cooperation. But even without precise terms, the government easily can induce a witness to believe that his treatment is dependent on his testimony. Thus, if any communication is reasonably susceptible of such an interpretation, it must be disclosed to the defense.

Hill, 432 Mass. at 716, 739 N.E.2d at 680 (citation omitted).

Experiences With Truth Telling and Embellishment, 68 Fordham L. Rev. 917, 932 (1999). Consequently, requiring the prosecution to disclose any inducement, no matter how "soft," ensures, to some degree, that the jury is informed that the witness's testimony may be motivated by a desire to curry favor and should be carefully evaluated.

Prosecutors, of course, wield enormous power. They can insist on the terms of the deal, determine what sentencing enhancements will apply, and influence how much credit will be given to the witness for his "substantial assistance." But a cooperating witness too wields power, particularly when, as with Guidry here, the witness's testimony is indispensable to establishing a case against a long-targeted defendant.[5]

In this case, Guidry balked just as he was about to enter his plea when it seemed as if the financial arrangements might not be accepted by Judge Parker. Guidry insisted that all of his

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[5] The United States Attorney for the Eastern District of Louisiana had twice, unsuccessfully, prosecuted Governor Edwards and was willing to deal with the most reprehensible of informants, and enter into secret deals with those informants, in order to obtain information that could lead to another prosecution of Governor Edwards. See United States v. Collins, Cr. 05-98-JE (S.E. Tex. Sept. 8, 2005), appeal pending, No. 05-20838 (5th Cir. 2006).

In Collins, United States Attorney Jim Letten was admonished by a District Court in Texas for making a secret deal with a cooperating witness, Patrick Graham (the confidential informant whose information led to the wiretaps in this case), whom the Court characterized as a "felon, a thief, a cheat, and a liar." The Court, overturning the defendants' conviction, sharply criticized Mr. Letten for resisting any disclosure of the secret benefits promised to Graham in exchange for his testimony.

demands be met, and that included his demand that he not owe any money, not a "nickel more," to the State of Louisiana. The prosecutors could not proceed on the alleged Treasure Chest scheme without Guidry so they capitulated, guaranteeing that the deal included civil immunity from any lawsuit by the State of Louisiana. Whether the prosecutors assured Guidry, without a legal basis, that the Moreau letter provided him with civil immunity, or whether they made a separate oral promise to that effect, remains unknown because Petitioners have never received an evidentiary hearing. Either way, during the trial and appeals process, the prosecutors took steps to conceal the full nature of their financial arrangement with Guidry, and, after trial, "went to bat" for Guidry, testifying on his behalf in State court in an effort to enjoin the State action.

We submit that the Fifth Circuit was wrong in this case and that disclosure of any statements made to Guidry to induce his cooperation was constitutionally required even if, as a matter of State law, the federal prosecutors could not bind the State of Louisiana. Undoubtedly, information that would have demonstrated that the federal government, in order to make a case against Governor Edwards, was prepared to protect Guidry's millions from any claim by the State of Louisiana would have been powerful fodder for cross-examination and would have cast doubt on the reliability of this indispensable witness.

This Court has not defined what it means by a "inducements," Bagley, 473 U.S. at 683, and the case law is inconsistent and irreconcilable. There is no clear-cut rule on whether the suppression of "soft words of hope" constitutes a constitutional violation. Yet the question of what must be disclosed is recurring and of extraordinary importance because cooperating witnesses are indispensable to the criminal justice system and the benefits that they are promised, explicitly or with "winks and nods," are essential to a jury's realistic evaluation of their credibility. This Court's intervention is necessary to

resolve this important and complex issue of constitutional law.

II. CERTIORARI SHOULD BE GRANTED TO DECIDE WHETHER BOOKER V. UNITED STATES IS RETROACTIVE

This Court's trio of sentencing decisions, Apprendi v. New Jersey, 530 U.S. 466 (2000), Blakely v. Washington, 542 U.S. 296 (2004), and Booker v. United States, 543 U.S. 220 (2005), have engendered confusion about whether they implicate only the Sixth Amendment right to a jury, or whether they also are grounded in the Fifth Amendment due process right to have factual findings made beyond a reasonable doubt. The distinction is critical: whether a fact is found by a judge or a jury may not be essential to accurate fact-finding, but the standard of proof is. Consequently, any analysis of the retroactivity of the Booker must involve a determination of whether these cases implicated the Fifth Amendment. Petitioners are seeking certiorari on this open question.[6]

In Apprendi v. New Jersey, 530 U.S. 466, 490 (2000), this Court held that, "other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (Emphasis added)

Four years later, in Blakely v. Washington, 542 U.S. 296 (2004), the Court, correcting a unanimous misinterpretation of

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[6] The Fifth Circuit acknowledged that Petitioners were seeking to preserve this issue for this Court's review, and never expressly addressed whether the Petitioners were entitled to amend their Section 2255 to raise the Booker issue. (App. 20)

Apprendi by the lower courts,[7] held that "the relevant statutory maximum is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." Id. at 303-04.

Within days of Blakely, Petitioners sought to amend their then-pending Section 2255 motions to raise a claim challenging the constitutionality of their sentences. The District Court denied Petitioners' motions solely on the basis of United States v. Pineiro, 377 F.3d 464 (5th Cir. 2004), judgment vacated, 543 U.S. 1101 (2005), which held, as did many federal courts, that Blakely did not apply to the federal Sentencing Guidelines.

In Booker v. United States, 543 U.S. 220 (2005), the "merits" majority concluded that Pineiro (along with other Circuit Court opinions), was wrongly decided and that Blakely applies with full force to the federal Sentencing Guidelines:

> Accordingly, we reaffirm our holding in Apprendi. Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt.

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[7] The Fifth Circuit, as did its sister Circuits, held that Apprendi did not apply to enhancements under the federal Sentencing Guidelines that did not result in a sentence above the statutory maximum. See, e.g., United States v. Doggett, 230 F.3d 160 (5th Cir. 2000), cert. denied, 531 U.S. 1177 (2001). Petitioners nonetheless raised Apprendi in their sentencing objections, disputing enhancements, among others, for the amount of "loss." The District Court rejected any Apprendi argument. (T1/8/01/pp.24-25)

543 U.S. at 243. (Emphasis added)

Since Booker, the Circuits have again united in their determination to limit its scope. The Circuits that have addressed the issue have held that Booker implicates only the Sixth Amendment right to a jury trial and, relying on this Court's decision in Schriro v. Summerlin, 542 U.S. 348 (2004), have concluded that Booker is not retroactive.[8]

Unanimity does not equate with validity, and the lower courts, we submit, are again wrong, and have failed to appreciate the complex constitutional principle announced in Apprendi-Blakely-Booker. There are at least three reasons why Booker deserves retroactive application.

First, the question of retroactivity only arises if Booker announced a "new rule," that is, "if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." Teague v. Lane, 489 U.S. 288, 301 (1989) (plurality opinion)(Emphasis in original)

Blakely and Booker were "dictated" by Apprendi. In Blakely, the Court observed that it was "apply[ing] the rule ... expressed" in Apprendi. Justice O'Connor, in her dissent, reinforced this understanding, noting that, because Blakely was "dictated" by Apprendi, it likely would apply to defendants who

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[8] See Guzman v. United States, 404 F.3d 139 (2d Cir.), cert. denied, 126 S.Ct. 731 (2005); Lloyd v. United States, 407 F.3d 608 (3d Cir.), cert. denied, 126 U.S. 288 (2005); United States v. Gentry, 432 F.3d 600 (5th Cir. 2005); Humphress v. United States, 398 F.3d 855 (6th Cir.), cert. denied, 126 U.S. 199 (2005); McReynolds v. United States, 397 F.3d 479 (7th Cir.), cert. denied, 125 S.Ct. 2559 (2005); United States v. Bellamy, 411 F.3d 1182 (10th Cir. 2005); Varela v. United States, 400 F.3d 864 (11th Cir.), cert. denied, 126 S.Ct. 312 (2005).

were sentenced after Apprendi, even if their direct appeals had concluded. Id. at 323. (O'Connor, J., dissenting). If Blakely left any doubt on this question, Justice Stevens laid it to rest in Booker, emphasizing that the constitutional principle announced in Booker – that any fact that increases a sentence above the statutory maximum must be found by a jury beyond a reasonable doubt – flowed directly from Apprendi and other prior precedent. Booker, 543 U.S. at 748.

Second, even if Booker announced a "new rule," it is a substantive rule. Substantive rules must be applied retroactively because "they necessarily carry a significant risk that a defendant stands convicted of 'an act that the law does not make criminal' or faces a punishment that the law cannot impose upon him." Schriro, 542 U.S. at 352, quoting Bousley v. United States, 523 U.S. 614, 620 (1998).

Booker declared unconstitutional the most critical component of the federal sentencing statute – the mandatory application of the Guidelines – and then created a new sentencing statute that fundamentally changes how sentences are to be imposed. Generally, when the Court interprets a statute to fundamentally change its meaning, the decision is applied retroactively.[9] The Booker "remedy" decision fundamentally altered how punishment is to be imposed in federal criminal cases. It is difficult to conceive of a more significant change in the federal sentencing system.

Third, and most importantly for purpose of this Court's review, assuming Booker constitutes a procedural rule, it fits within the class of constitutional principles so fundamental to the

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[9] See, e.g., Bousley, 523 U.S. at 620-21 (decision holding that "using" a firearm requires the government to prove "active employment" of the firearm is substantive and retroactive).

fairness of the proceedings that retroactive application is required. A new "procedural" rule will be applied retroactively if it constitutes a "watershed rule" that is "necessary to the fundamental fairness of the criminal proceeding." Sawyer v. Smith, 497 U.S. 227, 241-42 (1990). Apprendi-Blakely-Booker is just such a rule, involving the application of two separate constitutional rights: a defendant's right to a jury determination of certain sentencing facts, and, equally important, the defendant's right to have those facts proven beyond a reasonable doubt.

This Court has long made clear that a rule that involves the application of the reasonable doubt standard is so fundamental to the criminal justice system, it mandates retroactive review. In re Winship, 397 U.S. 358 (1970); Mullaney v. Wilbur, 421 U.S. 684 (1975); V. v. City of New York, 407 U.S. 203 (1972) (decision requiring proof beyond a reasonable doubt in juvenile proceedings must be applied retroactively); Hankerson v. North Carolina, 432 U.S. 233 (1977) (rule which invalidates presumption that shifts burden of proof must be applied retroactively).

Schriro, therefore, is not controlling. There, the question involved the retroactivity of Ring v. Arizona, 536 U.S. 584 (2002), invalidating a system where a judge, and not a jury, made the findings of aggravating circumstances necessary to impose the death penalty. This Court held that Ring did not establish a watershed rule because there is no overwhelming consensus that juries are more accurate fact-finders than judges. But, in Ring, the judge had to make the findings *beyond a reasonable doubt*. Thus, as the Court expressly noted, "that aspect of Apprendi was not at issue." 542 U.S. at 350, n.1.[10]

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[10] See generally Note, Rethinking Retroactivity, 118 Harv. L. Rev. 1642, 1663-64 (March 2005)(arguing for retroactivity and noting that the courts have ignored the focus in

The constitutional underpinnings of Booker must be clarified. As the Court is aware, the decision implicates the sentence of thousands of federal prisoners. The retroactivity question should be addressed by this Court so that those involved in the criminal justice system receive a dispositive ruling on this extraordinarily important question.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully,

Amy Adelson*
Nathan Z. Dershowitz
Dershowitz, Eiger & Adelson, P.C.
220 Fifth Avenue, Suite 300
New York, NY 10001
(212) 889-4009

Attorneys for Petitioners
Edwin Edwards and
Stephen Edwards

* COUNSEL OF RECORD

Dated: May 24, 2006

Schriro on accuracy in fact-finding process and that Apprendi and its progeny impacts on fact-finding accuracy because it requires reasonable doubt determinations).

APPENDIX

United States Court of Appeals,
Fifth Circuit.
UNITED STATES of America, Plaintiff-Appellee,
v.
Edwin EDWARDS, Defendant-Appellant.
United States of America, Plaintiff-Appellee,
v.
Andrew Martin, Defendant-Appellant.
United States of America, Plaintiff-Appellee,
v.
Stephen Edwards, Defendant-Appellant.
Nos. 04-31210, 04-31212 and 04-31219.

March 1, 2006.

Background: Defendants were convicted in the United States District Court for the Middle District of Louisiana, Frank J. Polozola, Chief Judge, of extortion, mail and wire fraud, money laundering, making false statements, and Racketeer Influenced and Corrupt Organizations Act (RICO) violations, for their roles in various schemes to make money from Louisiana's riverboat gambling license process. Following affirmance, 303 F.3d 606, the District Court denied defendants' motions to vacate or set aside their sentences, and defendants appealed.

Holdings: The Court of Appeals, King, Circuit Judge, held that:
(1) no *Brady* violation occurred from failure to disclose alleged secret immunity agreement, given speculative nature of agreement, and
(2) fact that cooperating witness was writing book during trial about events giving rise to prosecutions was not material for purposes of *Brady*.
Affirmed.

Stephen A. Higginson, Asst. U.S. Atty. (argued), New Orleans, LA, for U.S.

Amy M. Adelson (argued), Nathan Z. Dershowitz, Dershowitz, Eiger, Adelson, New York City, Michael S. Fawer, Covington, LA, J. Michael Small, Law Offices of J. Michael Small, Alexandria, LA, for Edwin and Stephen Edwards.

Servando C. Garcia, III, Garcia & Bishop, Metairie, LA, for Martin.

Appeals from the United States District Court for the Middle District of Louisiana.

Before KING, BARKSDALE and PRADO, Circuit Judges.

KING, Circuit Judge:

In this consolidated appeal, appellants Edwin Edwards, Stephen Edwards, and Andrew Martin challenge the district court's denial of their motions to vacate their sentences pursuant to 28 U.S.C. § 2255 and the district court's denial of an evidentiary hearing to determine whether the government withheld exculpatory evidence during their criminal trial in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). They also appeal the district court's denial of their motions for leave to amend their § 2255 motions after the one-year statute of limitations had expired to add a constitutional claim in light of *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005). For the reasons stated below, we AFFIRM.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Criminal Proceedings

Four-term Louisiana Governor Edwin Edwards, his son Stephen Edwards, and his executive assistant Andrew Martin (collectively, "Appellants"), along with several of their associates, were indicted on thirty-four federal counts by superseding indictments on August 4, 1999, for their roles in a

number of illegal activities designed to profit from awarding riverboat gambling licenses while Edwin Edwards was governor. The superseding indictments alleged that Appellants had conspired in five separate "schemes" to extort money from individuals who had applied to the Louisiana Riverboat Gaming Commission for a limited number of licenses to operate riverboat casinos along Louisiana's Gulf Coast and Lake Charles. In exchange for cash bribes, Appellants promised to use Governor Edwards's influence with the Riverboat Gaming Commission to help applicants obtain preliminary approval for the riverboat gambling licenses they sought; for those applicants who refused to pay, Appellants threatened to make obtaining a license impossible. Appellants then attempted to launder the extorted ***260** money to cover up their criminal activities. At their arraignments on August 24, 1999, Appellants entered pleas of not guilty.

On May 9, 2000, after a four-month trial in the United States District Court for the Middle District of Louisiana, the jury returned its verdict. Appellants were convicted of, inter alia, violating the Racketeer Influenced and Corrupt Organizations Act ("RICO"), RICO conspiracy, extortion, conspiracy to commit extortion, wire and mail fraud, conspiracy to commit wire and mail fraud, and conspiracy to commit money laundering.

On January 8, 2001, Appellants were sentenced under the United States Sentencing Guidelines. Governor Edwards was sentenced to 120 months and Stephen Edwards was sentenced to 84 months, and they were fined $250,000 and $60,000, respectively. Andrew Martin received 68 months and a $50,000 fine. A forfeiture order in the amount of $1.8 million was entered against each appellant. While all three sentences were within the Guidelines, they included enhancements for the amount of intended loss, and Governor Edwards's and Stephen Edwards's sentences also included enhancements for their roles in the offenses.

Appellants appealed their convictions and sentences to this court, which affirmed the district court's judgment on August 23, 2002. *United States v. Edwards*, 303 F.3d 606, 647 (5th Cir.2002). This court subsequently denied Appellants' petition for rehearing en banc. *United States v. Edwards*, 51 Fed.Appx. 485 (5th Cir.2002). On February 24, 2003, the Supreme Court denied Governor and Stephen Edwards's petition for writ of certiorari. *Edwards v. United States*, 537 U.S. 1192, 123 S.Ct. 1272, 154 L.Ed.2d 1025 (2003). The Court denied Andrew Martin's petition for writ of certiorari on March 3, 2003. *Martin v. United States*, 537 U.S. 1240, 123 S.Ct. 1369, 155 L.Ed.2d 209 (2003).

B. Post-Conviction Proceedings

1. Section 2255 Proceedings

On February 18, 2004, Appellants timely filed in the United States District Court for the Middle District of Louisiana cross-incorporated post-conviction motions to vacate their sentences under 28 U.S.C. § 2255, alleging six separate grounds for relief and requesting an evidentiary hearing. Two of these grounds, which are now before this court on appeal, alleged that during Appellants' trial the government withheld impeachment evidence relating to two of its key witnesses, Robert Guidry and John Brotherton, in violation of Appellants' due process rights under *Brady*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215.

a) Robert Guidry's Plea Agreement

In their § 2255 motions, Appellants asserted that the government violated their due process rights under *Brady* when it concealed information regarding the plea agreement of Louisiana businessman Robert Guidry, a government witness who had testified against Appellants pursuant to a grant of immunity. Appellants further maintained that Guidry gave false testimony concerning the scope of his plea agreement and that the

government failed to correct it in violation of *Napue v. Illinois*, 360 U.S. 264, 270, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959).

Appellants asserted that at their trial, the government relied heavily on Guidry's testimony to convict Appellants on counts related to the so-called "Treasure Chest Scheme." Guidry, the owner of the Treasure Chest Riverboat Casino, testified that in 1994 he had agreed to pay Appellants $100,000 per month in exchange for a license hearing before the Riverboat Gaming Commission. Guidry received a license ***261** and, after Governor Edwards left office in 1996, began making the monthly cash payments of $100,000. Guidry testified that between February 1996 and April 1997 he paid a total of $1.4- $1.5 million to Appellants.

Guidry gave this testimony in exchange for immunity from further prosecution pursuant to a written plea agreement with the federal government. Per the agreement, at his October 16, 1998, arraignment, Guidry pleaded guilty to one count of conspiracy to commit extortion related to the "Treasure Chest Scheme" in the United States District Court for the Middle District of Louisiana. The agreement also required that he forfeit $3 million and pay $250,000 in restitution and $250,000 in fines, capping his total financial liability to the federal government at $3.5 million. [FN1] In addition, Guidry received state immunity in an October 15, 1998, letter to Eddie Jordan, the United States Attorney for the Eastern District of Louisiana, signed by East Baton Rouge Parish District Attorney Doug Moreau. In this letter, Moreau promised that he would "defer to federal prosecution in the matter [and] grant [Guidry] immunity for crimes he may have committed concerning the Louisiana Riverboat Gaming Industry and specifically the Treasure Chest riverboat casino." Def. § 2255 Exh. tab 2. Guidry's plea agreement specified that "the statements set forth above represent the entire agreement with the government, any prior oral discussions or written letters do not affect this agreement." Def. § 2255 Exh. tab 1 at 4. The government produced Guidry's written plea agreement and the

Moreau letter to Appellants prior to the beginning of Appellants' criminal trial.

> FN1. Under the terms of the plea agreement, Guidry was to pay the $250,000 in restitution to be distributed by the court at sentencing to parties who could show that they suffered damages as a result of Guidry's conduct. *See* Def. § 2255 Exh. tab 1 at 2.

On October 7, 1999, the Louisiana Attorney General, on behalf of the state of Louisiana, filed a civil suit in state court against Guidry. The state sought damages arising from Guidry's illegal dealings with Appellants, including all of the profits resulting from Guidry's breach of fiduciary duty and the value of his gaming license. Shortly before the beginning of Appellants' criminal trial, the district court stayed the state action against Guidry pending the outcome of Appellants' trial. During Appellants' trial, Guidry testified that, although his financial liability to the federal government was capped at $3.5 million, his overall financial exposure was possibly much greater because he had "two or three lawsuits that's [sic] pending against all this money." 120 R. at 214. After Appellants' trial and convictions, Guidry was sentenced in federal court consistent with his plea agreement on January 17, 2001. [FN2]

> FN2. At the sentencing hearing, the state of Louisiana sought a restitution award out of the $250,000 that Guidry had paid to the court pursuant to his plea agreement, arguing a breach of fiduciary duty theory similar to the theory of recovery articulated in Louisiana's state court suit pending against Guidry at the time.

Soon thereafter, the state of Louisiana proceeded with its civil suit against Guidry. In support of his motion for a preliminary injunction, Guidry's defense attorneys argued that the immunity provisions set forth in the Moreau letter should be construed under Louisiana law to include immunity from state civil suit for

money damages as well as from state criminal prosecution. At a June 26, 2003, hearing on the motion, Guidry's attorneys attempted to elicit testimony from the federal and state prosecutors involved in the plea *262 agreement to support this civil immunity theory. The state court judge denied the preliminary injunction on the ground that, given the testimony from the hearing, "there was simply no meeting of the minds" regarding an agreement to extend civil immunity to Guidry. Def. § 2255 Exh. tab 16 at 5.

Despite the state court's finding, Appellants, citing newly discovered evidence of a *Brady* violation, built on Guidry's civil immunity theory a year later during their § 2255 proceedings. They argued that Guidry's plea agreement went beyond the contents of the written agreement and the Moreau letter because Guidry had also entered into an unwritten, undisclosed deal with federal prosecutors and the state of Louisiana immunizing Guidry from financial liability to the state arising from crimes he may have committed in connection with the Treasure Chest Casino. Appellants further suggested that a federal judge approved this separate agreement at Guidry's 1998 arraignment in a secret, off-the-record chambers conference with Guidry, his lawyers, and the prosecutors.

b) John Brotherton's Book Deal

In their § 2255 motions, Governor and Stephen Edwards ("the Edwardses") [FN3] also contended that the government violated their due process rights under *Brady* when it failed to disclose that, during the trial, cooperating witness John Brotherton had been writing a book about his role in the Edwards case. The Edwardses asserted that Brotherton, a Vice President for the Players Casino Company who testified pursuant to a grant of immunity, was a crucial witness in the government's "Players Scheme" case because he and Richard Shetler, an Edwards family friend and paid consultant for Players, were the only two witnesses to testify to extortion connected with the Players

Casino.

> FN3. Appellant Andrew Martin was not named in the "Players Scheme" counts of the indictment and thus was not found guilty of the related racketeering counts that Brotherton's testimony addressed.

The Edwardses argued that the government's failure to disclose that Brotherton was writing a book deprived them of impeachment evidence concerning Brotherton's purported financial stake in the outcome of the trial. Moreover, the Edwardses contended that the contents of the book revealed further exculpatory evidence that the government had failed to disclose in violation of *Brady*, including the existence of tape recordings obtained from a wiretap of an undercover informant.

c) The District Court's Ruling

The district court denied Appellants' § 2255 motions and their request for an evidentiary hearing on November 3, 2004. The court found that there was no evidence that the government had concealed the extent of Guidry's financial immunity in violation of Appellants' due process rights because (1) Guidry testified extensively on cross-examination about the terms of his plea agreement, including the limitations on his federal forfeiture, his understanding of his immunity deal with the state of Louisiana, and his plea agreement's relationship to the pending collateral civil suits; (2) Appellants were able to impeach Guidry effectively on the financial liability limitation contained in his written plea agreement, and even if the government had disclosed its purported belief that the state lawsuit against Guidry was barred because of his financial immunity deal, such information "would have been at best, cumulative," and at worst, "not material"; and (3) Appellants' "argument that the plea agreement contained an undisclosed (***263** and unwritten) clause which barred the State from seeking monetary damages from Guidry is speculative and unsupported" by the evidence. Ruling

on Petitioner's Motion to Vacate, Set Aside, or Correct Sentence, No. 98-165-C, at 7-9 (Nov. 3, 2004) [hereinafter "Dist. Ct. § 2255 Ruling"]. Because the court found no evidence of an undisclosed financial immunity deal, it also rejected Appellants' contention that Guidry gave false testimony at trial that the government failed to correct.

Likewise, the district court rejected Appellants' assertion that the government's failure to disclose John Brotherton's book deal violated Appellants' due process rights under *Brady*. Because "*Brady* requires that materiality be determined in light of all evidence at trial," the court examined the totality of the evidence supporting the convictions for the "Players Scheme." *Id.* at 28-29. The court found that ample evidence besides Brotherton's testimony supported the convictions, and "[i]t is rank speculation to conclude that, compared with this incriminating evidence, any marginally more impeaching evidence concerning Brotherton could have created in the jurors' minds reasonable doubt as to the [Appellants'] guilt." *Id.* at 29.

Appellants filed notices of appeal of the district court's ruling and motions for a certificate of appealability ("COA") on November 30, 2004.

2. Appellants' Motions to Amend Their § 2255 Motions

Appellants did not challenge the constitutionality of their sentences in the § 2255 motions that they filed on February 18, 2004. On June 24, 2004, the United States Supreme Court handed down *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), striking down a state sentencing guideline scheme that allowed sentence enhancements based on facts found by a judge and not a jury. Anticipating that the Supreme Court might extend *Blakely* to the federal Sentencing Guidelines, Appellants filed motions for leave to amend their § 2255 motions on July 1, 2004, outside of the § 2255, ¶ 6, one-year limitation period. In a ruling dated September 4, 2004,

the district court denied Appellants' motions based solely on *United States v. Pineiro*, 377 F.3d 464 (5th Cir.2004), *vacated*, 543 U.S. 1101, 125 S.Ct. 1003, 160 L.Ed.2d 1006 (2005), which held that *Blakely* did not invalidate the federal Sentencing Guidelines. Appellants filed notices of appeal and motions for a COA on November 30, 2004. Shortly thereafter, on January 12, 2005, the Supreme Court handed down *Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621, which applied *Blakely* to hold the mandatory application of the federal Sentencing Guidelines unconstitutional.

3. Certificate of Appealability

On December 13, 2004, the district court granted each Appellant a COA pursuant to 28 U.S.C. § 2253(c)(1)(B), finding that Appellants had demonstrated a substantial showing of the denial of a constitutional right on the following issues:

> 1. Whether the [Appellants'] due process rights were violated by the government's failure to disclose a promise to cooperating witness Robert Guidry that he would not be liable in money damages to the State of Louisiana.
> 2. Whether the [Appellants'] due process rights were violated by the government's failure to correct Robert Guidry's trial testimony that he faced financial exposure from the lawsuits pending against him and from the denial of an evidentiary hearing on this issue.
> 3. Whether the [Appellants'] due process rights were violated by the government's failure to disclose exculpatory, ***264** impeachment material relating to cooperating witness John Brotherton and from the denial of an evidentiary hearing on this issue.
> 4. Whether the [Appellants] should be permitted to raise a constitutional claim pursuant to *Blakely v. Washington*.

Appellants now request that this court reverse the district court's judgment and vacate their convictions, or, in the alternative, remand for an evidentiary hearing.

II. DISCUSSION

A. Standard of Review

[1][2][3] Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), our review is limited to the issues enumerated in the COA. [FN4] 28 U.S.C. § 2253(c)(1). In reviewing a district court's denial of a motion to vacate sentence under § 2255, we review questions of fact for clear error and questions of law de novo. *United States v. Chavez*, 193 F.3d 375, 378 (5th Cir.1999). Claims that the government violated *Brady v. Maryland* are mixed questions of law and fact that we review de novo. *United States v. Hughes*, 230 F.3d 815, 819 (5th Cir.2000); *Felder v. Johnson*, 180 F.3d 206, 211 (5th Cir.1999). We review for abuse of discretion a district court's denial of an evidentiary hearing, which we will grant only "[i]f the [Appellants] produce[ ] independent indicia of the likely merit of [their] allegations." *United States v. Cervantes*, 132 F.3d 1106, 1110 (5th Cir.1998); *see also United States v. Auten*, 632 F.2d 478, 480 (5th Cir.1980) (noting that mere conclusory allegations are not sufficient to support a request for an evidentiary hearing). A district court's denial of a motion to amend a § 2255 motion is also subject to review for abuse of discretion. *United States v. Saenz*, 282 F.3d 354, 356 (5th Cir.2002).

> FN4. AEDPA applies because Appellants filed their § 2255 motions on February 18, 2004, well after AEDPA's effective date of April 24, 1996. *See United States v. Williamson*, 183 F.3d 458, 461 n. 2 (5th Cir.1999).

B. Analysis

1. The Alleged Brady Violations

[4] Under *Brady*, "the suppression by the prosecution of evidence favorable to an accused upon request violates due

process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87, 83 S.Ct. 1194. The Supreme Court subsequently extended this principle to impeachment evidence, holding that "[w]hen the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within this general rule." *Giglio v. United States*, 405 U.S. 150, 154, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972) (quoting *Napue*, 360 U.S. at 269, 79 S.Ct. 1173); *see also United States v. Bagley*, 473 U.S. 667, 676-77, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985) (rejecting any distinction between exculpatory and impeachment evidence for *Brady* purposes). To establish a *Brady* violation, Appellants must prove that (1) the prosecution suppressed evidence; (2) the evidence was favorable to the defendant because it was either exculpatory or impeaching; and (3) the evidence was material. *United States v. Sipe*, 388 F.3d 471, 477 (5th Cir.2004); *see also Strickler v. Greene*, 527 U.S. 263, 281-82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999); *Kyles v. Whitley*, 514 U.S. 419, 433-38, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995).

a) Robert Guidry's Plea Agreement

[5] Appellants allege that the government violated *Brady* with regard to cooperating witness Robert Guidry because (1) in addition to a grant of immunity from ***265** state prosecution, Guidry's plea deal included a secret, unwritten promise of immunity from any future civil suit for damages that the state of Louisiana might bring against him; (2) the deal was confected without Appellants' knowledge by federal prosecutors, the Baton Rouge district attorney's office, and Guidry's defense lawyers and then secretly approved by a federal judge; and (3) the government failed to disclose the deal to Appellants prior to trial, depriving them of valuable impeachment evidence.

Our review of the record reveals no factual support for this improbable scenario: instead, the record affirmatively

contradicts Appellants' arguments. To support their theory, Appellants rely primarily on the transcript of a 2003 state court hearing on Guidry's request for a preliminary injunction of the state lawsuit filed against him. Appellants maintain that the testimony that Guidry's attorneys elicited from federal and state prosecutors who were parties to the Guidry plea negotiations indicates that there was indeed a hidden promise limiting Guidry's state financial liability. To the contrary, the record reflects that even Guidry's attorneys--who Appellants claim negotiated the alleged deal with the state and federal prosecutors--never argued or attempted to insinuate during questioning that Guidry had agreed to a secret deal that included civil immunity. Rather, they merely argued that the state immunity provisions set forth in the Moreau letter should be construed under Louisiana law to include immunity from the state civil suit. [FN5] The theory alleging an unwritten side deal was articulated for the very first time in Appellants' § 2255 motions, six years after Guidry entered into his written plea agreement and more than one year after Guidry's state court preliminary injunction hearing.

> FN5. Guidry's attorneys did not argue the existence of a hidden deal in their January 31, 2003, Memorandum in Support of Request for Preliminary Injunction:
> Unquestionably, the State could not prosecute Guidry criminally under the immunity granted to him. The question here is whether the immunity agreement bars the state from prosecuting this so-called civil lawsuit on the basis of his immunized information and testimony. We submit firstly that the State is barred from using the immunized information and testimony under Louisiana immunity law, and alternatively, it is barred because the lawsuit in reality is an attempt to obtain restitution, a criminal penalty, under the guise of a civil claim. Allowing this suit to proceed on the basis of the immunized information and testimony would result in an erroneous interpretation of Louisiana's immunity law and

an improper application of federal and state principles of criminal restitution.

Def. § 2255 Exh. tab 11 at 4.

Likewise, Guidry's attorneys did not assert that their client had agreed to such a deal in an affidavit submitted in support of their motion for a preliminary injunction. The most they alleged was that Guidry "still refused to enter a plea and cooperate with the government unless he could be assured that the State of Louisiana would defer its interest in the case to the federal government and would agree to limit its financial recovery to the amount specified in the federal proceeding." Even this statement stops short of alleging the actual existence of an agreement limiting Guidry's state financial exposure. Def. § 2255 Exh. tab 12 at 2.

Moreover, at least two of the attorneys who allegedly concocted the secret plea agreement--East Baton Rouge Parish District Attorney Doug Moreau and Assistant United States Attorney Fred Harper--testified under oath at the hearing that no mutual understanding or provision limiting Guidry's state financial liability ever existed. Indeed, at the time that Moreau extended state immunity "for crimes [Guidry] may have committed" in return for Guidry's cooperation with federal authorities, the state civil lawsuit against Guidry had not been filed, and it is ***266** clear from the record that none of the actors involved even contemplated that the state would pursue such a lawsuit. According to Moreau, "I had never even thought about [civil immunity] before this lawsuit .... I did not contemplate the use immunity or transactional immunity in regard to civil proceedings. That ... never crossed my mind .... I didn't even know of such a concept as civil immunity." Def. § 2255 Exh. tab 15 at 42-44. Likewise, Harper testified that side agreements outside the scope of the written plea agreement would have been prohibited and that no one involved had anticipated that the state of Louisiana would subsequently bring a civil suit against Guidry:

[N]ever, in my experience, have I ever had a situation where unbeknownst to me at the time this plea agreement was entered into, and I believe at the time Mr. Guidry pled guilty, ... the state of Louisiana, or anybody else for that matter, sued a cooperating defendant in a criminal case .... Never, in any case in the 28 years I've been doing this, have I ever seen the state sue a cooperating defendant civilly .... [T]he thought of a civil action brought by the state of Louisiana against this cooperating defendant never entered anybody's mind.

Id. at 67-68. [FN6]

> FN6. Resting its decision on this testimony, the state court ultimately denied Guidry's motion for a preliminary injunction, stating, "[c]onsidering the testimony of the witnesses at the hearing, it is clear that there was simply no meeting of the minds regarding any civil liability of Mr. Guidry .... The court reads [the Moreau letter's] granting of immunity to apply to criminal culpability only and not to any civil matters." Def. § 2255 Exh. tab 16 at 5.

Finally, Appellants contend that a federal judge colluded with the federal prosecutors and Guidry's attorneys to approve the alleged civil immunity agreement at Guidry's arraignment in an in camera, "secret proceeding." Appellants offer no support for this serious allegation other than pointing to a short, off-the-record chambers conference between the judge and the attorneys that happened during Guidry's arraignment and speculating that something illicit occurred during the recess. This contention is wholly without merit, particularly because this same judge later rejected the argument that the federal plea agreement necessarily limited Guidry's financial liability to the state during the restitution portion of Guidry's sentencing. *See* Def. § 2255 Exh. tab 10 at 18-19.

Our review of the record leaves us with the firm conviction that there was no clandestine, collateral plea agreement protecting Guidry from state financial liability. Appellants' contentions are speculative and find no support in Guidry's plea agreement, the Moreau immunity letter, the transcripts of proceedings from the state's lawsuit against Guidry, or the record on appeal. [FN7] Because "[t]he prosecution has no duty to turn over to the defense evidence that does not exist," we reject Appellants' *Brady* claims with respect to Robert Guidry. [FN8] *Brogdon v. Blackburn*, 790 F.2d 1164, 1168 (5th Cir.1986) (per curiam); *see also* ***267** *United States v. Rivera Rangel*, 396 F.3d 476, 486 n. 11 (1st Cir.2005) (reversing the district court's grant of a new trial based on an alleged *Brady* violation resulting from the suppression of a cooperating witness's plea agreement, noting that "the district court's finding that [the witness] entered into a plea agreement was entirely at odds with the only evidence--which was in the form of sworn statements--that had been offered on the subject, and as a result, it was unjustified"); *Todd v. Schomig*, 283 F.3d 842, 849 (7th Cir.2002) (addressing a prisoner's claim that the government suppressed the existence of a cooperating witness's plea agreement and holding, "Todd cannot prove an agreement existed .... Without an agreement, no evidence was suppressed, and the state's conduct, not disclosing something it did not have, cannot be considered a *Brady* violation").

> FN7. For the same reasons, the district court did not abuse its discretion when it denied Appellants' request for an evidentiary hearing. Appellants have failed to provide "independent indicia" of the likely merits of their allegations and instead rely on speculation based on a misreading of the record, which is insufficient to warrant an evidentiary hearing. *See Cervantes*, 132 F.3d at 1110; *Auten*, 632 F.2d at 480 ("[C]onclusory assertions do not support the request for an evidentiary hearing.").

FN8. Accordingly, we need not address the materiality vel non of the allegedly suppressed evidence. Likewise, because the record reveals neither that a civil immunity agreement concerning Guidry existed, nor that the government was aware that Guidry might have believed that such a deal existed, we need not address Appellants' related claim that the government violated their due process rights in violation of *Napue*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217, by failing to correct Guidry's allegedly false testimony.

b) John Brotherton's Book Deal

[6] The Edwardses also contend that the government violated their *Brady* rights by failing to disclose: (1) that cooperating witness John Brotherton was writing a book during their trial; (2) Brotherton's allegation in the book that the government secretly recorded a meeting between Brotherton and government informant Patrick Graham, which the government subsequently failed to disclose to the Edwardses; and (3) a fabricated memorandum that Brotherton claims he prepared at one point to secure a job with a tribal casino, which he also discusses in his book.

Even if the government had known that Brotherton was writing a book and had failed to provide the Edwardses with this information--and it is unclear from the record whether this was even the case [FN9]--the Edwardses' claim fails because the evidence was not material for *Brady* purposes. " '[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.' " *Rector v. Johnson*, 120 F.3d 551, 562 (5th Cir.1997) (quoting *Bagley*, 473 U.S. at 682, 105 S.Ct. 3375 (1985)). Specifically, we must determine whether the allegedly suppressed evidence, considered collectively and in light of all of the evidence at trial, could

reasonably be taken to put the entire case in a different light so as to " 'undermine[ ] confidence in the outcome of the trial.' " *Kyles*, 514 U.S. at 434, 115 S.Ct. 1555 (quoting *Bagley*, 473 U.S. at 678, 105 S.Ct. 3375); *see also Duncan v. Cain*, 278 F.3d 537, 539 (5th Cir.2002).

> FN9. The Edwardses' assertions that the government even knew of Brotherton's book deal are largely speculative. The Edwardses cite the book's preface, in which Brotherton congratulates the government on its successful prosecution of Governor Edwards, for the proposition that "the prosecutors were *apparently* aware of" both the existence and the contents of Brotherton's book. Edwards Br. at 46 (emphasis added). Moreover, to support their claim, the Edwardses merely assert that "the government has not denied" knowledge of this evidence. *Id.* at 50. This argument ignores that the Edwardses, as the parties alleging a *Brady* violation, have the burden of establishing all three prongs of the *Brady* test. *See, e.g., Sipe*, 388 F.3d at 477 ("To establish a *Brady* violation, a *defendant* must make three showings ....") (emphasis added).

The Edwardses speculate that the fact that Brotherton was writing a book and the book's contents would have been sufficiently impeaching to undermine confidence in the jury verdict; however, taken ***268** in context, this evidence would have had at best only a marginal impact on the government's case against the Edwardses. Brotherton was not the only witness to testify against the Edwardses regarding the "Players Scheme," nor was he the most important. The trial record reflects that Richard Shetler, another Players employee and long-time Edwards family friend, provided extensive, damning testimony about the Edwardses' dealings with the casino. The government further bolstered this testimonial evidence with copious exhibit evidence and inculpatory taped conversations.

Given the amount of incriminating evidence other than Brotherton's testimony that the government presented, the allegedly suppressed impeachment evidence is simply too insignificant to undermine confidence in the jury's verdict. *See* *Kopycinski v. Scott*, 64 F.3d 223, 226-27 (5th Cir.1995) (rejecting a habeas petitioner's *Brady* claim where the suppressed impeachment evidence was immaterial in light of the other, corroborated testimony and physical evidence supporting petitioner's conviction); *see also* *Pippin v. Dretke*, 434 F.3d 782, 789 n.7 (5th Cir.2005) ("A claim that is largely speculative with respect to the effect of the allegedly exculpatory evidence on the jury's ultimate determination of guilt or innocence cannot support a *Brady* violation."). We thus reject the Edwardses' *Brady* claim with respect to John Brotherton. [FN10]

> FN10. Although, in the alternative, the Edwardses urge us to grant an evidentiary hearing to explore their theory further, we decline to do so. Due to the speculative and conclusory nature of the Edwardses' allegations with respect to both the suppression and materiality *Brady* prongs, such a hearing would serve as nothing more than a fishing expedition. *See* *Cervantes*, 132 F.3d at 1110 (noting that an evidentiary hearing is warranted only "[i]f the [Appellants] produce[ ] independent indicia of the likely merit of [their] allegations"); *Auten*, 632 F.2d at 480 (denying an evidentiary hearing because the conclusory allegations set forth were not sufficient to support a request for an evidentiary hearing). We have also denied evidentiary hearings to explore similarly unsupported claims in state habeas proceedings under § 2254, applying the same standard. *See* *Hughes v. Johnson*, 191 F.3d 607, 629 (5th Cir.1999) (denying an evidentiary hearing to investigate a "purely speculative" *Brady* claim); *Johnson v. Scott*, 68 F.3d 106, 112 (5th Cir.1995) ("The [habeas] petitioner must set forth specific allegations of fact, not mere conclusory allegations."); *Ellis v. Lynaugh*, 873 F.2d 830, 840 (5th

Cir.1989) ("The court need not blindly accept speculative and inconcrete claims as the basis upon which to order a hearing.") (internal quotation marks and citation omitted).

2. Appellants' Booker Claims

Finally, Appellants argue that the district court erred in denying their motions for leave to amend their § 2255 motions in light of *Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621, and *Blakely*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403. Although they acknowledge that they did not challenge the constitutionality of their sentences on direct appeal or in their initial § 2255 motions, Appellants argue that, in the wake of *Booker* and *Blakely*, they should now be allowed to amend their § 2255 motions to add a collateral constitutional challenge to their sentences.

[7] This argument is foreclosed before this court by *United States v. Gentry*, 432 F.3d 600, 605 (5th Cir.2005), and *In re Elwood*, 408 F.3d 211, 212-13 (5th Cir.2005) (per curiam), both of which hold that the *Blakely*/ *Booker* line of cases does not apply retroactively to cases on collateral review. Appellants correctly conceded in oral argument that this precedent forecloses relief before this court. They raise this issue only to preserve it for possible Supreme Court review, and we decline to consider it further.

***269** III. CONCLUSION

For the foregoing reasons, we AFFIRM the judgment of the district court.

UNITES STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

FILED
U.S. DIST. COURT
MIDDLE DIST. OF LA.
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SIGN_____
By DEPUTY CLERK

UNITES STATES OF AMERICA

VERSUS

CRIMINAL ACTION
NUMBER 98-165-C

EDWIN EDWARDS
STEPHEN EDWARDS
ANDREW MARTIN
BOBBY JOHNSON

RULING ON MOTION TO AMEND SECTION 2255 MOTIONS

This matter is before the court on the petitioners' Motion For Leave To Amend Section 2255 Motions.[1] The Motions are opposed.[2]

By separate motion, each petitioner sought to amend his § 2255 motion to add an additional claim that his sentence is subject to attack in light of the recent decision by the United States Supreme Court in *Blakely v. Washington*, 542 U.S. ___, 124 S. Ct. 2531, 159 L.Ed.2d 403 (2004).

The government opposed the motions arguing that the claim is untimely, *Blakely* did not constitutionally invalidate the

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[1] Record document numbers 2701, 2073, and 2074.

[2] Record document number 2076.

United States Sentencing Guidelines, and even if *Blakely* invalidated the United States Sentencing Guidelines, its application is not retroactively applicable.

Petitioners's *Blakely* issue is foreclosed in this circuit under *United States v. Pineiro*, 377 F.3d 464 (5th Cir. 2004), in which the court held that *Blakely* does not invalidate the Federal Sentencing Guidelines.

Accordingly, the petitioners' Motion For Leave To Amend Section 2255 Motions is DENIED.

Baton Rouge, Louisiana, September 20, 2004.

/s/

RALPH E. TYSON
UNITED STATES DISTRICT JUDGE

UNITES STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

FILED
NOV 03 2004

Deputy Clerk, U.S. District Court
Middle District of Louisiana
Baton Route, La.

UNITES STATES OF AMERICA

VERSUS

CRIMINAL ACTION
NUMBER 98-165-C

EDWIN EDWARDS

RULING ON PETITIONER'S MOTION TO VACATE, SET ASIDE, OR CORRECT SENTENCE

This matter is before the court on the Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255 filed on behalf of petitioner Edwin Edwards.[1]

Petitioner was found guilty of extortion, money laundering and RICO violations by a jury in the United States District Court for the Middle District of Louisiana. Judgment was imposed on January 12, 2001. Petitioner's conviction was affirmed on appeal. *United States v. Edwin Edwards*, 303 F.3d 606 (5th Cir. 2002), *cert. denied*, 537 U.S. 1192, 123 S. Ct. 1272, 154 L.Ed.2d 1025 (2003).

Petitioner's § 2255 motion was filed timely. No evidentiary hearing is required.

[1] Record document number 1969.

Petitioner raised the following grounds for relief in his § 2255 motion: (1) he was denied due process when the prosecutor failed to produce impeachment evidence about a cooperating witness and failed to correct the cooperating witness' false testimony; (2) he was denied due process and a fair trial by jurors' exposure to prejudicial extraneous material and by juror misconduct reflecting juror bias; (3) he was denied due process because the trial judge was not impartial and presided over his criminal case while impaired in function; and (4) he was denied due process through prosecutorial misconduct.

There are four grounds upon which a federal prisoner may move to vacate, set aside, or correct his sentence: (1) the sentence was imposed in violation of the Constitution or laws of the United States; (2) the court was without jurisdiction to impose the sentence; (3) the sentence exceeds the statutory maximum sentence; and (4) the sentence is otherwise subject to collateral attack. 28 U.S.C. § 2255; *Hill v. United States*, 368 U.S. 424, 426-27, 82 S. Ct. 468, 470-71, 7 L.Ed.2d 417 (1962).

Ground 1: Brady/Giglio Violation

In the first ground for relief, the petitioner argued that the government suppressed favorable impeachment evidence relating to cooperating witness Robert Guidry and failed to correct Guidry's false testimony.[2]

In the first component of this claim, the petitioner argued that the government failed to disclose a promise to Guidry that his financial exposure to the State of Louisiana was limited by the plea agreement.

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[2] Edwin Edwards, Stephen Edwards, and Martin extorted Guidry, who was a principal of the Treasure Chest Casino.

Specifically, the petitioner argued that federal prosecutor failed to disclose a "guarantee" made to Guidry that he would not face financial exposure from a State civil lawsuit because of the $3.5 million forfeiture cap set forth in the plea agreement.

The prosecution's suppression of material evidence favorable to the accused violates due process regardless of whether or not the prosecution acted in good faith or bad faith in failing to make a timely disclosure of the evidence. *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196, 10 L.Ed.2d 215 (1963); *Jones v. Butler*, 864 F.2d 348, 354 (5th Cir. 1988), *cert. denied*, 490 U.S. 1075, 109 S. Ct. 2090, 104 L.Ed.2d 653 (1989). Only when omitted evidence is deemed material can a defendant successfully claim that nondisclosure deprived him of his constitutional right to a fair trial. *United States v. Agurs*, 427 U.S. 97, 108, 96 S. Ct. 2392, 2400, 49 L.Ed.2d 342 (1976). Omitted evidence is deemed material when, viewed in the context of the entire record, it creates a reasonable doubt as to the defendant's guilt that did not otherwise exist. *Id.* at 112, 96 S. Ct. at 2402, 49 L.Ed.2d at 355.

To be entitled to relief, the petitioner must show: (1) the prosecution suppressed evidence, (2) the suppressed evidence was "favorable to the accused," and (3) the evidence was "material" either to guilty or punishment. *Brady*, 373 U.S. at 87, 83 S. Ct. at 1196; *Brogdon v. Butler*, 790 F.2d 1164, 1167 (5th Cir. 1986), *cert. denied*, 481 U.S. 1042, 107 S. Ct. 3245, 95 L.Ed.2d 824 (1987). Evidence that is "favorable to the accused" includes evidence that tends directly to exculpate the accused as well as evidence that impeaches the testimony of a witness where the reliability or credibility of that witness may be determinative of guilt or innocence. *Giglio v. United States*, 405 U.S. 150, 154, 92 S. Ct. 763, 31 L.Ed.2d 104 (1972); *Porretto v. Stalder*, 834 F.2d 461, 464 (5th Cir. 1987). The touchstone of materiality is a "reasonable probability" of a different result. *Kyles v. Whitley*, 514 U.S. 419, 434, 115 S. Ct. 1555, 1566, 131 L.Ed.2d 490 (1995). "The question is not whether the defendant would more

likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Id.*

When the reliability of a given witness may well be determinative of guilt or innocence, nondisclosure of evidence affecting credibility falls within the general rule of *Brady*. *United States v. Scott*, 48 F.3d 1389, 1395 (5th Cir.), *cert. denied*, 516 U.S. 902, 116 S. Ct. 264, 133 L.Ed.2d 187 (1995).

Under *Brady*, the prosecution has no obligation to produce evidence or information already known to the defendant, or that could be obtained through the defendant's exercise of reasonable diligence. *Brown v. Cain*, 104 F.3d 744, (5th Cir.), *cert. denied*, 520 U.S. 1195, 117 S. Ct. 1489, 137 L.Ed.2d 699 (1997). Evidence is not "suppressed" if the defendant either knew, or should have known of the essential facts permitting him to take advantage of any exculpatory evidence. *Rector v. Johnson*, 120 F.3d 551, 560 (5th Cir. 1997), *cert. denied*, 522 U.S. 1120, 118 S. Ct. 1061, 140 L.Ed.2d 122 (1998); *West v. Johnson*, 92 F.3d 1385, 1399 (5th Cir. 1996), *cert. denied*, 520 U.S. 1242, 117 S. Ct. 1847, 137 L.Ed.2d 1050 (1997).

The following facts are not in dispute. On October 15, 1998, East Baton Rouge Parish District Attorney Doug Moreau submitted a letter to United States Attorney Eddie J. Jordan Jr. authorizing Jordan to inform Guidry that he "would defer to federal prosecution" and would grand Guidry "immunity for crimes he may have committed concerning the Louisiana Riverboat Gaming Industry and specifically the Treasure Chest riverboat casino."[3]

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[3] Defendant's exhibit 2.

On October 16, 1998, Guidry pled guilty to one count of conspiracy to violate the Hobbs Act-Extortion in violation of 18 U.S.C. § 371. The plea agreement provided in relevant part for a fine of $250,000, a deposit of $250,000 in the registry of the Court to make restitution, and forfeiture to the United States the sum of three million dollars. The plea agreement further provided that "the statements set forth above represent the entire agreement with the governm ent, any prior oral discussions or written letters do not affect this agreement."[4] Approximately three weeks later, an indictment was returned charging the petitioner and co-defendants with crimes associated with the Treasure Chest Scheme.

On October 7, 1999, approximately one year after Guidry entered his guilty plea, the State of Louisiana filed a civil suite against Guidry in the Nineteenth Judicial District Court for the Parish of East Baton Rouge seeking damages stemming from Guidry's illegal activity in obtaining the riverboat gaming license.[5] The suit was stayed during the pendency of the petitioner's criminal trial and appeal. The stay issued by this court on November 19, 2001[6], was lifted without further proceedings on September 22, 2002.[7]

Petitioner concedes that at the time of his criminal trial he was aware of the Moreau immunity letter, the contents of Guidry's plea agreement, and the State civil lawsuit against Guidry. The gist of the petitioner's argument is that although Guidry and federal prosecutors believed that the plea agreement limited Guidry's financial exposure to $3.5 million, federal

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[4] Defendant's exhibit 2.

[5] Defendant's exhibit 7.

[6] Record document number 1765.

[7] Record document number 1791.

prosecutors "never disclosed to the defense or to the jury that, in the federal government's view, the State lawsuit could not proceed because, as a result of the plea agreement, the State of Louisiana was precluded from seeking monetary damages." Petitioner's *Brady* claim is without merit.

First, Guidry testified extensively on cross-examination about the terms of his plea agreement.[8] Guidry testified that pursuant to the federal forfeiture provisions he could have been required to forfeit as much as $214 million but that under the terms of the plea agreement he would be required to forfeit only three million dollars.[9] Guidry further testified that at that time he had two or three lawsuits pending against him.[10] Guidry testified that he understood the forfeiture clause in the plea agreement to protect all of his companies.[11] Guidry also testified about his understanding of the Moreau immunity agreement and its relationship to the lawsuits.[12]

Second, the terms of the plea agreement, including its apparent forfeiture cap, were used effectively by the petitioner and his co-defendants to impeach Guidry "on the incredible financial deal."[13] Disclosure of the "federal government's view" for the purposes of impeaching Guidry would have been at best,

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[8] Transcript, February 4, 2000, pgs. 199-220.

[9] Transcript, February 4, 2000, p. 212.

[10] Transcript, February 4, 2000, p. 214.

[11] Transcript, February 4, 2000, pgs. 218-219.

[12] Transcript, February 4, 2000, pgs. 221-233.

[13] Transcript, April 19, 2000, pgs. 20-21, 103; April 20, 2000, p. 103.

cumulative.[14] At worst, evidence of the "federal government's view" regarding the merits of the State's civil suit against Guidry was not material.

Third, the petitioner's argument that the plea agreement contained an undisclosed (and unwritten) clause which barred the State from seeking monetary damages from Guidry is speculative and unsupported by the plea agreement, the Moreau immunity letter, the trial record, and the State's pending lawsuit against Guidry.

In the second component of this claim, the petitioner argued that federal prosecutors failed to correct Guidry's false testimony in violation of his due process rights. Specifically, the petitioner argued that Guidry testified falsely that the extent of his financial exposure exceeded $3.5 million because of "two or three lawsuits" pending against him. Petitioner argued that Guidry knew when he testified "that the government had promised him he would not be liable" for monetary damages to the State.

The Due Process Clause forbids the government from knowingly using or failing to correct false testimony, including testimony about the nature or existence of a cooperating witness's plea agreement. *Giglio v. United States*, 405 U.S. at 153-54, 92 S. Ct. 766; *Napue v. Illinois*, 360 U.S. 264, 269, 79 S. Ct. 1173, 3 L.Ed.2d 1217 (1959); *United States v. Mason*, 293 F.3d 826, 828 (5th Cir. 2002). To prove a violation, the criminal defendant must show that (1) a witness testified falsely, (2) the government knew that the testimony was false, and (3) the testimony was material. *Mason*, 293 F.3d at 828. Testimony is "material" in this context, and thus a new trial is required, "if the

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[14] *See, United States v. O'Keefe*, 128 F.3d 885, 897 (5th Cir. 1997), *cert. denied*, 523 U.S. 1078, 118 S. Ct. 1525, 140 L.Ed.2d 676 (1998).

false testimony could . . . in any reasonable likelihood have affected the judgment of the jury." *Giglio*, 405 U.S. at 154, 92 S. Ct. 766 (internal quotation marks omitted and alteration in original); *see also Barrientes v. Johnson*, 221 F.3d 741, 753 (5th Cir. 2000).

As previously noted, there is no evidence of a hidden promise by the government. Guidry testified that his forfeiture exposure was $214 million while the plea agreement provided for a forfeiture of only three million dollars. Guidry's testimony regarding the existence of pending lawsuits was neither false, nor did it leave a false impression. Petitioner's *Giglio* claim is without merit.

Ground 2: Exposure to Extraneous Material and Juror Bias

In the second ground for relief, the petitioner argued that he was denied due process and a fair trial by the jurors' exposure to prejudicial extraneous material and by juror misconduct reflecting juror bias.

In the first component of this claim, the petitioner argued that during deliberations, Juror 68 advised a deputy marshal that he was intimidated by another juror who stated that if the jury did not reach a unanimous verdict, the jurors would probably go to jail. Petitioner further argued that the court failed to advise defense counsel that the juror made the prejudicial comment.

A district court can invoke the procedural bar *sua sponte* in a § 2255 case. *United States v. Willis*, 273 F.3d 592 (5th Cir. 2001). A movant is barred from raising jurisdictional and constitutional claims for the first time on collateral review unless he demonstrates cause for failing to raise the issue on direct appeal and actual prejudice resulting from the error. *United States v. Pierce*, 959 F.2d 1297, 1301 (5th Cir.), *cert. denied*, 506 U.S. 1007, 113 S. Ct. 621, 121 L.Ed.2d 554 (1992). No other types of errors may be raised on collateral review unless the

movant demonstrates that "the error could not have been raised on direct appeal, and if condoned, would result in a complete miscarriage of justice." *Id.* (internal quotations and citation omitted).

Petitioner's argument that he was precluded from raising this claim on appeal because the letter prepared by counsel for Juror Number 68 setting forth the specific nature of Juror Number 68's intimidation was placed under seal in a separate miscellaneous file is simply not persuasive. A review of the record showed that the petitioner was aware of Juror 68's complaint of intimidation and his conversation with the Deputy Marshal before direct appeal. Moreover, the trial court conducted extensive juror interviews addressing alleged juror misconduct, including Juror Number 68's intimidation complaint. Petitioner's exposure to prejudicial extraneous material claim as it relates to Juror Number 68's complaint of intimidation is procedurally barred.

Even if the claim were not procedurally barred, it is nonetheless without merit.

In any trial there is initially a presumption of jury impartiality. *United States v. O'Keefe*, 722 F.2d 1175, 1179 (5th Cir. 1983); *accord United States v. Winkle*, 587 F.2d 705, 714 (5th Cir.), *cert. denied*, 444 U.S. 827, 100 S. Ct. 51, 62 L.Ed.2d 34 (1979). This presumption may be attacked, and prejudice may be shown through evidence that the extrinsic factual matter tainted the jury's deliberations. *United States v. Ruggiero*, 56 F.3d 647, 652 (5th Cir.), 516 U.S. 979, 116 S. Ct. 486, 133 L.Ed.2d 413 (1995) (*citing O'Keefe*, 722 F.2d at 1179); *accord Winkle*, 587 F.2d at 714; *United States v. Howard*, 506 F.2d 865 (5th Cir. 1975).

When "a colorable showing of extrinsic influence appears, a court must investigate the asserted impropriety." *Ruggiero*, 56 F.3d 652 (*quoting Winkle*, 587 F.2d at 714); *accord*

United States v. Sanchez-Sotelo, 8 F.3d 202, 212 (5th Cir. 1993), *cert. denied*, 511 U.S. 1023, 114 S. Ct. 1410, 128 L.Ed.2d 82 (1994).

When extrinsic evidence is introduced into the jury room, a defendant is entitled to a new trial "unless there is no reasonable possibility that the jury's verdict was influenced by the material that improperly came before it." *United States v. Luffred*, 911 F.2d 1011, 1014 (5th Cir. 1990) (*quoting Llewellyn v. Stynchcombe*, 609 F.2d 194, 195 (5th Cir. 1980)); *accord Sanchez-Sotelo*, 8 F.3d at 212; *United States v. Ortiz*, 942 F.2d 903, 913 (5th Cir. 1991), *cert. denied*, 504 U.S. 985, 112 S. Ct. 2966, 119 L.Ed.2d 587 (1992); *Winkle*, 587 F.2d at 714. However, not every intrusion on the jury creates a rebuttable presumption of prejudice to the defendant. Only when the court determines that prejudice is likely should the government be required to prove its absence. *Sylvester*, 143 F.3d 923, 932-34 (5th Cir. 1998). To exercise this discretion properly, a district court must examine the complained-of intrusion on the jury and determine whether it is of a nature and degree that is likely to have a prejudicial effect. *United States v. Smith*, 354 F.3d 390, 395 (5th Cir. 2003), *cert. denied*, ___ U.S. ___, 124 S. Ct. 1698, 158 L.Ed.2d 386 (2004).

The record evidence showed the following. Jury deliberations commenced on April 24, 2000. On May 2, 2000, the court conducted an investigation into possible juror misconduct, including Juror Number 68's allegations of juror intimidation during deliberations.[15] Each juror was questioned by the court with counsel for the government and the defendants present. On May 4, 2000, Juror Number 68 was removed for

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[15] Record document 1896, transcript pgs. 103-278.

cause.[16] Following his removal, and purportedly in response to assertions made by the government in its opposition to the defendants' motion for a judgment of acquittal or new trial, Juror Number 68 obtained legal representation. In a letter dated October 2, 2000, counsel for Juror Number 68 advised the court that Juror Number 68 desired to bring to the Court's attention what Juror Number 68 believed to be serious misconduct by jurors during deliberations.[17]

On November 8, 2000, the defendants filed a motion for inquiry involving Juror Number 64, the jury foreman.[18] Defendants' brief in support of the motion for inquiry and the government's opposition to the defendants' motion were filed under seal.[19]

On December 6, 2000, the defendants filed a motion to place the October 2, 2000 letter into the record and to conduct an

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[16] The district court's finding that Juror 68 should be dismissed for just cause because he displayed a lack of candor and was unable to follow instructions was clearly supported. *United States v. Edwin Edwards, et al* 303 F.3d 606, 631-32 (5th Cir. 2002), *cert. denied*, 537 U.S. 1192, 123 S. Ct. 1272, 154 L.Ed.2d 1025 (2003).

[17] The October 2, 2000 letter was placed under seal in a miscellaneous record. Sealed v. Sealed, 00-38-B. On October 23, 2000, the defendants' motion for disclosure of information related to Juror Number 68 was filed in 00-38-B. On October 30, 2000, the court ordered copies of the October 2, 2000 letter be released under seal to counsel for the government and the defendants.

[18] Record document number 1624.

[19] See record document numbers 1625 and 1627, respectively.

inquiry into allegations raised in that letter. The motion and supporting memorandum were filed under seal.[20]

On December 6, 2000, a hearing was held in chambers with counsel present on the investigation of the alleged misconduct of Juror Number 64 and on the allegations made in the defendants' December 6 motion.[21] Insofar as the defendants' December 6 motion sought to have the October 2, 2000 letter filed into the record, the motion was denied.[22]

On December 7, 2000, the hearing on the investigation of alleged juror misconduct continued.[23] Witnesses were called to testify regarding alleged juror misconduct, including Juror Number 64. The court found no factual or legal basis to find Juror Number 64 engaged in improper conduct.[24] Additionally, the court determined that no further investigation was required on the conduct of the jury or any particular juror.[25]

The court's investigation into juror misconduct specifically addressed whether any juror was subjected to threats, including Juror Number 68's allegations that the jury foreman had intimidated other jurors with comments that the jury might go to jail if they did not render a unanimous verdict. Each juror

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[20] Record document numbers 1663 and 1664.

[21] Record document number 1696, transcript pgs. 159-209.

[22] Record document number 1696, transcript p. 206.

[23] Record document number 1697, transcript pgs. 150-214, 249-261.

[24] Record document number 1697, transcript p. 260.

[25] Record document number 1697, transcript p. 261.

was interrogated and denied being intimidated by the jury foreman. The court found there was no juror misconduct.

Petitioner has not established a colorable showing of extrinsic influence on the jury. Moreover, even if the comment were from an extrinsic source, there is no reasonable possibility that the jury's verdict was influenced by the comment.

Petitioner argued two other specific instances of exposure to prejudicial extraneous material or outside influence. First, the petitioner argued that, according to Juror Number 68[26], a number of jurors indicated that they had watched television, read newspapers, and spoke to others about the case. In the second instance, the petitioner argued that, according to Juror Number 68, one juror's spouse attended the proceedings and reported on what happened in the courtroom while the jurors were excused to the jury room.

In the interview conducted on January 24, 2001, Juror Number 68 stated that jurors were in fact watching television and reading newspapers. Specifically, Juror Number 68 stated the following:

> "When certain witnesses would testify, they would come back the next day and say they saw so-and-so. I can't remember exactly the instances they said and I didn't pay attention to those instances because I didn't know that in the future they were going to nit-pick any and every little thing that I did."

Defendants' exhibit 17, Interview Transcript, p. 5.

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[26] Petitioner based this aspect of his exposure to prejudicial extraneous material claim on Juror Number 68's unsworn statements made in a January 24, 2001 press interview.

Juror Number 68 conceded during the interview that he could not recount any specific instance where a particular juror admitted to having read newspapers or watched television. Under these circumstances, any specific recollection now, nearly four years after Juror Number 68 was removed from the jury, would be suspect and unreliable.

In the interview, Juror Number 68 also stated that one juror spoke to a neighbor about the case. Specifically, Juror Number 68 stated the following:

> "There was one particular juror, the same juror that questioned the alternates, who said that they had a friend they would walk with at home in the evenings. Her friend would call her by name and say, "I know you're not suppose to talk about the trial but you know they're guilty." And the juror responded by saying 'I know.'"

Defendants' exhibit 17, Interview Transcript, p. 5.

Finally, in the interview, Juror Number 68 stated that a juror's spouse attended the proceedings one day. Juror Number 68 stated the following:

> "One juror had his spouse come into the courtroom one day to observe what was going on. At times the jury would be dismissed out the courtroom, judge's orders, you know. We didn't know what was going on during that period of time. He dismissed us for a few moments. Maybe an argument was going on or something. I don't know. Anyway, his spouse sat out there and she was going to let him know what went on while we were out of the jury room. And the next day he came back and told us that there was nothing that went on. I think the judge and the

> attorneys went into his chambers or something. They went out of the courtroom. There was nothing that went on that day. That's what she told him."

Defendants' exhibit 17, Interview Transcript, p. 2.

None of these allegations are sufficient to establish a colorable showing of extraneous prejudicial information. Petitioner has failed to demonstrate that outside influences were brought to bear on the jury.

In the second component of this claim, the petitioner argued that he was denied due process and a fair trial by juror misconduct reflecting juror bias. Based on Juror Number 68's unsworn statements made in the January 24, 2001 press interview, petitioner argued that prior to deliberations, several jurors made comments which were intended "to coerce a guilty verdict."

A jury should not be exposed to post-verdict fishing expeditions into their mental processes with the hope that something will turn up. *United States v. Blackburn*, 446 F.2d 1089 (5th Cir. 1971), 404 U.S. 1017, 92 S. Ct. 679, 30 L.Ed.2d 665 (1972). Inquiries that seek to probe the mental process of jurors . . . are impermissible. *Llewellyn v. Stynchcombe*, 609 F.2d at 196. However, a juror may impeach the jury's verdict with evidence that the verdict was influenced by outside sources. *See Mattox v. United States*, 146 U.S. 140, 13 S. Ct. 50, 36 L.Ed. 917 (1892).

Rule 606(b) of the Federal Rules of Evidence provides the following:

> Inquiry into validity of verdict or indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any

> matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

Fed.R.Evid. 606(b).

Rule 606(b) bars juror testimony regarding the following four topics: (1) the method or arguments of the jury's deliberations, (2) the effect of any particular thing upon an outcome in the deliberations, (3) the mindset or emotions of any juror during deliberations, and (4) the testifying juror's own mental process during the deliberations. *Ortiz*, 942 F.2d at 913.

A convicted defendant is not entitled to probe into the function of the jury unless he makes a substantial showing that some kind of outside influence may have tainted the jury's deliberations. *United States v. Cauble*, 532 F.Supp. 804 (E.D. Texas 1982), *aff'd* 757 F.2d 282 (5th Cir. 1985), *cert. denied*, 474 U.S. 994, 106 S. Ct. 406, 88 L.Ed.2d 357 (1985). Pressure from other jurors is not considered an "outside influence," and an affidavit or other evidence concerning such pressure is inadmissible. *United States v. Straach*, 987 F.2d 232, 241-242 (5th Cir. 1993); *United States v. Vincent*, 648 F.2d 1046, 1049-50 (5th Cir. 1981).

Consideration of the petitioner's remaining allegations regarding comments by jurors reflecting juror bias are prohibited by Rule 606(b). Although the alleged comments did not occur during formal jury deliberations, the statements are inadmissible because they relate to the jurors mental processes or mindset with respect to the verdict. *See Untied States v. Ortiz*, 942 F.2d 903, 913 (5th Cir. 1991), 504 U.S. 985, 112 S. Ct. 2966, 119 L.Ed.2d 587 (1992).

Finally, the petitioner argued that he was denied due process and a fair trial by Juror Number 334's failure to disclose prior contacts with Edwin and Stephen Edwards. Specifically, the petitioner argued that Juror Number 334 failed to "honestly disclose[] her efforts to enlist the help of the Edwardses" and failed "to candidly reveal her prior contacts with Edwin and Stephen Edwards."

The proper time to discover juror prejudice is when the jury is being selected and peremptory challenges are available to the attorneys. *United States v. Duzac*, 622 F.2d 911, 913 (5th Cir.), cert. denied, 449 U.S. 1012, 101 S. Ct. 570, 66 L.Ed.2d 471 (1980). A jury's verdict may not be disturbed if it is later learned that personal prejudices were not put aside during deliberations. *Id.*

Ground 3: Denial of Due Process and Fair Trial

In the third group for relief, the petitioner argued that the trial judge was (1) not impartial, and (2) suffered from a mental and physical impairment is his ability to function which resulted in a denial of due process and a fair trial.

In the first component of his due process claim, the petitioner argued that the trial judge was not impartial. Specifically, the petitioner argued that the decision by the trial judge to allot the case to himself, to preside over the case while impaired in his ability to function, to fail to disclose his physical

and mental impairment, and to deny the petitioner's motion to recuse, in aggregate establish partiality.

Litigants have a due process right to "an impartial and disinterested tribunal in both civil and criminal cases." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242, 100 S. Ct. 1610, 64 L.Ed.2d 182 (1980). Impartiality in the judicial context is the lack of bias for or against a party to the proceeding. *Republican Party of Minnesota v. White*, 536 U.S. 765, 775-776, 122 S. Ct. 2528, 2535, 153 L.Ed.2d 694 (2002). Impartiality guarantees a party that the judge who hears his case will apply the law to him in the same way he applies it to any other party. *Id.* The impartiality guaranteed to litigants adheres to a core principle that "[N]o man is permitted to try cases where he has an interest in the outcome." *In re Murchison*, 349 U.S. 133, 136, 75 S. Ct. 623, 99 L.Ed. 942 (1955).

An impartial judge is essential to due process. *Tumey v. Ohio*, 273 U.S. 510, 523, 531-534, 47 S. Ct. 437, 71 L.Ed. 749 (1927) (judge violated due process by sitting in a case in which it would be in his financial interest to find against one of the parties); *In re Murchison*, 349 U.S., at 137-139, 75 S. Ct., at 625-627 (judge violated due process by sitting in the criminal trial of defendant whom he had indicted); *Johnson v. Mississippi*, 403 U.S. 212, 215-216, 91 S. Ct. 1778, 29 L.Ed.2d (1971) (*per curiam*) (judge violated due process by sitting in a case in which one of the parties was a previously successful litigant against him); *Bracy v. Gramley*, 520 U.S. 899, 905, 117 S. Ct. 1793, 138 L.Ed.2d 97 (1997) (would be a due process violation if a judge was disposed to rule against defendants who did not bribe him in order to cover up the fact that he regularly ruled in favor of defendants who did bribe him).

A litigant is deprived of due process where the judge who hears his case has a "direct, personal, substantial, and pecuniary" interest in ruling against him. *Aetna Life Ins. Co. V. Lavoie*, 475 U.S. 813, 824, 106 S. Ct. 1580, 89 L.Ed.2d 823 (1986). The

interest need not be direct, but may stem from the judge's knowledge that his success and tenure in office depend on certain outcomes. *Ward v. Monroeville*, 409 U.S. 57, 93 S. C.t 80, 34 L.Ed.2d 267 (1972) (due process violated where fines collected from guilty defendants constituted large part of a village's finances, from which the judge, who also served as the village mayor, was responsible). Due process does not require a showing that the judge is actually biased as a result of his self-interest. Rather, "justice must satisfy the appearance of justice." *In re Murchison*, 349 U.S., at 136, 75 S. Ct., at 625.

Petitioner failed to establish that the trial judge had a "direct, personal, substantial, and pecuniary" interest in presiding over the petitioner's criminal case. Petitioner's argument that the trial judge "specifically assign[ed] this highly public case to himself" is not supported by the record which showed that all three United States District Judges for the Middle District of Louisiana signed an en banc order which assigned the petitioner's criminal case to the trial judge.[27] Moreover, the fact

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[27] There is no statute that requires random case assignment. Congress delegated the power over assignments to the District Courts. 28 U.S.C. § 137. ("The business of a court having more than one judge shall be divided among the judges as provided by the rules and orders of the court."). There is no constitutional basis for such a requirement. *See, e.g., United States v. Keane*, 522 F.2d 534, 557 (7th Cir. 1975), *cert. denied*, 424 U.S. 976, 96 S. Ct. 1481, 47 L.Ed.2d 746 (1976) (rejecting argument that due process requires that a criminal case be randomly assigned).

District judges may by rule, order or consent assign the cases between themselves. *United States v. Stone*, 411 F.2d 597, 598 (5th Cir. 1969). Indeed, there are well-established exceptions to the general practice of random assignment. Assigning related matters to the same judge is one of the most recognized. *See,*

that the trial judge did not avoid his judicial duties, including presiding over the petitioner's criminal trial, after sustaining injuries in an automobile accident 20 months prior to the petitioner's indictment simply does not support the petitioner's claim of judicial partiality. Finally, the petitioner's argument that his judicial partiality claim is supported by the trial judge's failure to divulge his medical information to him is patently frivolous. Petitioner's due process claim based on judicial bias is without merit.

In the second component of his due process claim, the petitioner argued that he was denied due process and a fair trial because the trial judge was mentally and physically impaired during crucial portions of the criminal proceedings.

Petitioner argued that the district judge who presided over his criminal prosecution was involved in an automobile accident 20 months before the petitioner was indicted. Petitioner argued that the trial judge filed a lawsuit in state court seeking monetary damages for injuries, mental anguish, and impairment of function resulting from the accident. Relying on press reports of medical

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e.g., III Guide to Judiciary Policies and Procedures: Judges Manual, Sec. A, Ch. 4, Part B (2002) ("Many courts have also implemented special procedures . . . for assuring that related cases are all assigned to the same judge."). Each judge of a multi-judge court has the same power and authority as each other judge. *United States v. Stone*, 411 F.2d at 598.

Petitioner did not challenge the allotment of his criminal case as a separate ground for relief. Nor could he since the claim is procedurally barred. (A section 2255 movant who fails to raise a constitutional or jurisdictional issue on direct appeal waives the issue for a collateral attack on his conviction, unless there is cause for the default and prejudice as a result. *United States v. Kallestad*, 236 F.3d 225, 227 (5th Cir. 2000)).

information contained in the sealed proceedings, the petitioner argued that the presiding judge was prescribed, and presumably took, narcotic painkillers during a time when pretrial proceedings were held resulting in a denial of due process.

Petitioner has not cited, nor has the court found, any jurisprudence on point.[28] Rather, the petitioner relied on a line of cases holding that a criminal defendant under the influence of alcohol or drugs may be deemed temporarily incompetent for purposes of entering a guilty plea. Petitioner argued that if a court must be assured that a criminal defendant taking medication is capable of entering a plea, then conversely, a criminal defendant is "entitled" to know whether the presiding judge "is capable of making informed decisions."

Due process implies a tribunal mentally competent to afford a hearing. *Jordan v. Massachusetts*, 225 U.S. 167 (1912). In the context of juror competency, the law is well settled that a jury's verdict will be set aside only if the defendant presents "clear evidence of a juror's incompetence to understand the issues and deliberate at the time of his service." *United States v. Doguardi*, 492 F.2d 70, 78 (2d Cir. 1974), *cert. denied*, 419 U.S. 873, 95 S. Ct. 134, 42 L.Ed.2d 112 (1974). If a juror's mental competence is to be attacked at the late stage offered by a habeas corpus proceeding, the charge must be made in much more certain terms and not on a tentative basis. *United States ex. rel. Daverse v. Hohn*, 198 F.2d 934, 938 (3d Cir.), *cert. denied*, 344 U.S. 913, 73 S. Ct. 336, 97 L.Ed 704 (1953). A fishing expedition into a juror's competency may not be employed as a basis to attack a conviction valid on its face. *Id.* "[A]bsent . . . substantial if not wholly conclusive evidence of incompetency,

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[28] Petitioner's reliance on a Ninth Circuit panel opinion which, on rehearing was withdrawn by the court sitting en banc is simply not persuasive. More importantly, the facts in the cited case are inapposite.

courts have been unwilling to subject a juror to a hearing on his mental condition merely on the allegations and opinions of a losing party." *Doguardi*, 492 F.2d at 80. When faced with allegations that a juror was mentally incompetent, "courts have refused to set aside a verdict, or even to make further inquiry, unless there be proof of an adjudication of insanity or mental incompetence closely in advance . . . of jury service," or proof of "a closely contemporaneous and independent post-trial adjudication of incompetency." *Tanner v. United States*, 483 U.S. 107, 119, 107 S. Ct. 2739, 2747, 97 L.Ed.2d 90 (1987); *Doguardi*, 492 F.2d at 80; *United States v. Allen*, 588 F.2d 1100, 1106-07 (5th Cir.), *cert. denied* 441 U.S. 965, 99 S. Ct. 2415, 60 L.Ed.2d 1071 (1979); *Sullivan v. Fogg*, 613 F.2d 465, 467 (2d Cir. 1980).

Petitioner failed to point to any facts that raise a bona fide doubt as to the mental or physical competency of the trial judge during these criminal proceedings.[29] Petitioner's argument that the trial judge's "impairment of function" may have "rendered him unable to concentrate, think clearly, or make rational decisions" is weak, conclusory, wholly unsupported by the record, and fails to evidence a physical or mental infirmity as contemplated by the courts in Jordan and its progeny. Under these circumstances, further inquiry into the trial judge's competency through discovery or an evidentiary hearing is not warranted.

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[29] Petitioner relied on a single statement by the trial judge as illustrative of his "volatility." The trial judge's statement consisted of nothing more than an admonition to the parties and their counsel to maintain courtroom decorum and in no way supports a finding of mental or physical incompetency.

Ground 4: Prosecutorial Misconduct

In the fourth ground for relief, the petitioner argued that he was denied due process and a fair trial as a result of prosecutorial misconduct.

In the first component of this claim, the petitioner argued that the government relied on a factual theory inconsistent and irreconcilable with a theory it relied on at the subsequent unrelated trial of co-defendant Cecil Brown in *United States v. Brown*, Criminal Action Number 01-004 (E.D. La.). Specifically, the petitioner argued that the government substantially changed its theory about the source of Edwin Edwards' unaccounted for funds at the subsequent trial and that this inconsistency violated his due process rights.

Petitioner failed to cite any supporting Supreme Court or Fifth Circuit authority for his estoppel argument. Petitioner relied on the decisions in *Smith v. Groose*,[30] *Thompson v. Calderon*[31], and the concurring opinion of Judge T. Clark in *Drake v. Kemp*,[32] which held that due process rights are violated when a prosecutor presents two different and inconsistent theories of the same crime in two different trials. The Fifth Circuit has rejected similar estoppel arguments. *See, Nichols v. Scott*, 69 F.3d 1255 n.34 (5th Cir. 1995), 518 U.S. 1022, 116 S.

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[30] 205 F.3d 1045, 1050 (8th Cir.), 531 U.S. 985, 121 S. Ct. 441, 148 L.Ed.2d 446 (2000).

[31] 120 F.3d 1045, 1058 (9th Cir. 1997) (en banc), *rev'd on other grounds*, 523 U.S. 538, 118 S. Ct. 1489, 140 L.Ed.2d 728 (1998).

[32] 762 F.2d 1449, 1470-1479 (11th Cir. 1985) (en banc), *cert. denied*, 478 U.S. 1020, 106 S. Ct. 3333, 92 L.Ed.2d 738 (1986).

Ct. 2559, 135 L.Ed.2d 1076 (1996); *United States v. Sharpe*, 193 F.3d 852, 872 (5th Cir. 1999), *cert. denied*, 528 U.S. 1173, 120 S. Ct. 1205, 145 L.Ed.2d 1105 (2000); *Jacobs v. Scott*, 31 F.3d 1319, 1326 (5th Cir. 1994), *cert. denied*, 513 U.S. 1067, 115 S. Ct. 711, 130 L.Ed.2d 618 (1995).

In the second component of this claim, the petitioner argued that federal prosecutors suppressed evidence in violation of *Brady*. Specifically, the petitioner argued that federal prosecutors withheld: (1) information that John Brotherton[33] was writing a book about his role in the *Edwards* case, (2) a tape recording of a meeting between Brotherton and Patrick Graham, and (3) a fabricated memorandum prepared by Brotherton to secure a job with a tribal casino. Petitioner argued that the information could have been used to impeach Brotherson.

As was previously noted, to be entitled to relief, the petitioner must show: (1) the prosecution suppressed evidence, (2) the suppressed evidence was "favorable to the accused," and (3) the evidence was "material" either to guilt or punishment. *Brady*, 373 U.S. at 87, 83 S. Ct. at 1196.

Petitioner's *Brady* claim is without merit. *Brady* requires that materiality be determined in light of all evidence at trial. In addition to Brotherton's testimony, the Players Scheme evidence included the testimony of Ricky Shelter, inculpatory taped conversations, and exhibit evidence. It is rank speculation to conclude that, compared with this incriminating evidence, any marginally more impeaching evidence concerning Brotherton could have created in the jurors' minds a reasonable doubt as to the petitioner's guilt.

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[33] Brotherton, a former Vice President of Players Casino, testified on behalf of the government regarding the Players Scheme.

In the third component of this claim, the petitioner argued that the government failed to disclose drafts of wiretap applications.

This aspect of the petitioner's prosecutorial misconduct claim is procedurally barred. See United States v. Kallestad, 236 F.3d at 227 ("A section 2255 movant who fails to raise a constitutional or jurisdictional issue on direct appeal waives the issue for a collateral attack on his conviction, unless there is cause for the default and prejudice as a result.").
Petitioner failed to raise the draft wiretap application issue on direct appeal and is procedurally barred from raising it now.

For the foregoing reasons, Edwin Edwars' Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255 is DENIED.

Judgment shall be entered accordingly.

Baton Rouge, Louisiana, November 3, 2004.

/s/

RALPH E. TYSON
UNITED STATES DISTRICT JUDGE

No. 05-1504

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JUN 28 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 2005

EDWIN EDWARDS and
STEPHEN EDWARDS,
Petitioners,

--against--

UNITED STATES OF AMERICA,
Respondent.

ON A PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR REHEARING

AMY ADELSON*
NATHAN Z. DERSHOWITZ
DERSHOWITZ, EIGER
& ADELSON, P.C.
220 Fifth Avenue
Suite 300
New York, NY 10001
(212) 889-4009

* Counsel of Record

Attorneys for Petitioners
EDWIN AND STEPHEN EDWARDS

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PETITION FOR REHEARING

Pursuant to Rule 44.2, Petitioners Edwin and Stephen Edwards respectfully petition this Court for rehearing of the denial of their Petition for a Writ of Certiorari. The Petition was denied on June 26, 2006.

On May 24, 2006, Petitioners filed a Petition for a Writ of Certiorari that raised two questions for review. The second question dealt with the retroactivity of Booker v. United States, 543 U.S. 220 (2005): specifically, "whether Booker v. United States should be retroactively applied to criminal cases on collateral review."

On June 5, 2006, the Court granted certiorari in Burton v. Waddington, No. 05-9222, granting cert. to 142 Fed.Appx. 297 (9th Cir. 2005), to decide whether Blakely v. Washington, 542 U.S. 296 (2004), is retroactive to cases on collateral review. Blakely is the State counterpart to Booker, applying virtually the same principles of constitutional law.

Because resolution of the issue in Burton will likely impact on the question presented in Petitioners's case, and on whether Booker is retroactive, Petitioners respectfully petition for rehearing or, alternatively, ask that their Petition be held until disposition of Burton v. Waddington.

CONCLUSION

For the foregoing reasons, the Petition for Rehearing should be granted, or, alternatively, the Petition should be held until disposition of Burton v. Waddington, No. 05-9222 (June 5, 2006).

Respectfully,

Amy Adelson*
Nathan Z. Dershowitz
Dershowitz, Eiger & Adelson, P.C.
220 Fifth Avenue, Suite 300
New York, NY 10001
(212) 889-4009

Attorneys for Petitioners
Edwin Edwards and
Stephen Edwards

* COUNSEL OF RECORD

Dated: June 28, 2006

CERTIFICATE OF COUNSEL

As counsel for Petitioners, I hereby certify that this Petition for Rehearing is presented in good faith and not for purposes of delay and is limited to intervening circumstances, namely, the Court's decision, after the filing of the Petition, to grant certiorari in a possibly controlling case.

Amy Adelson
Counsel for Petitioners